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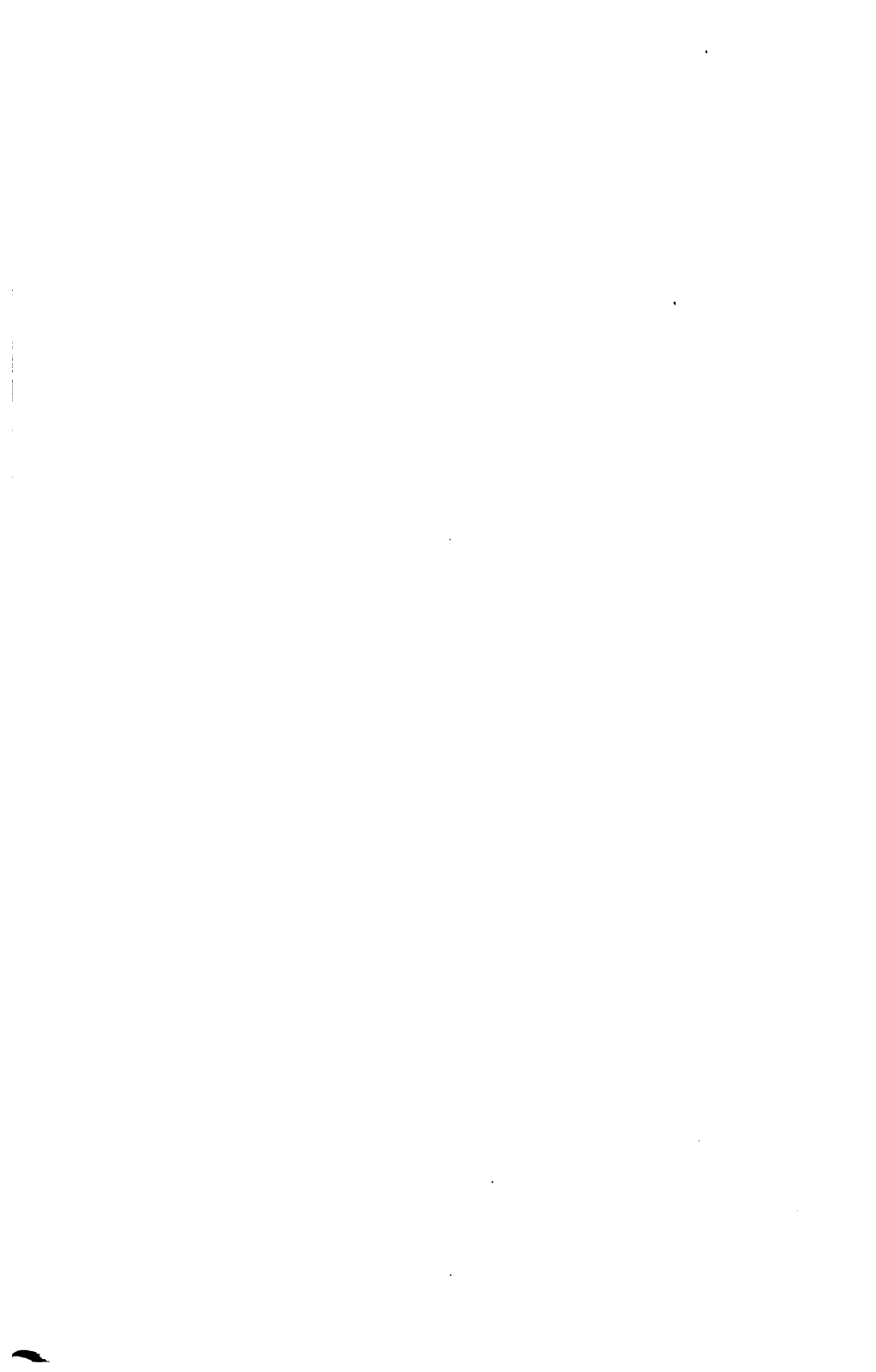
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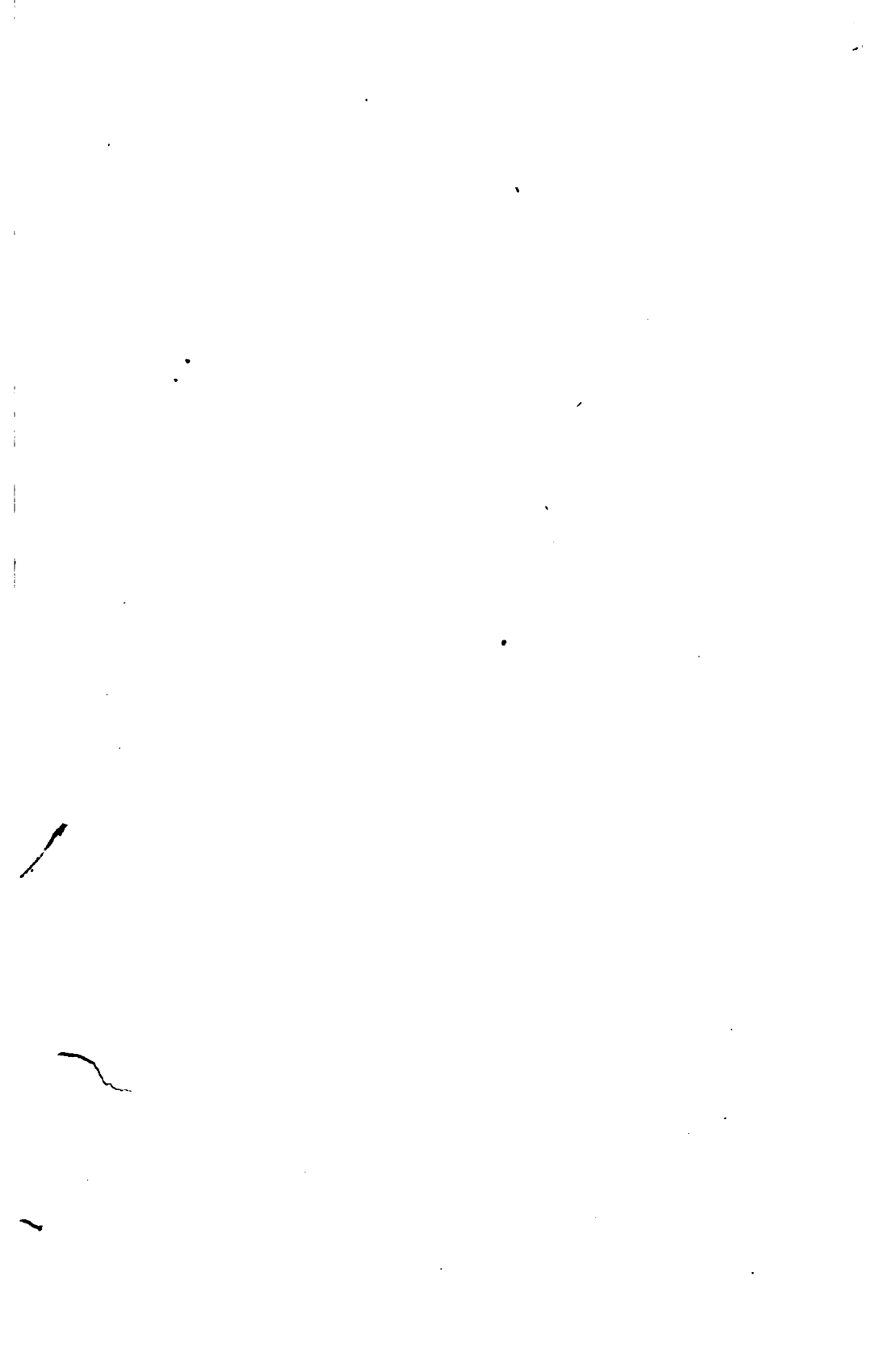


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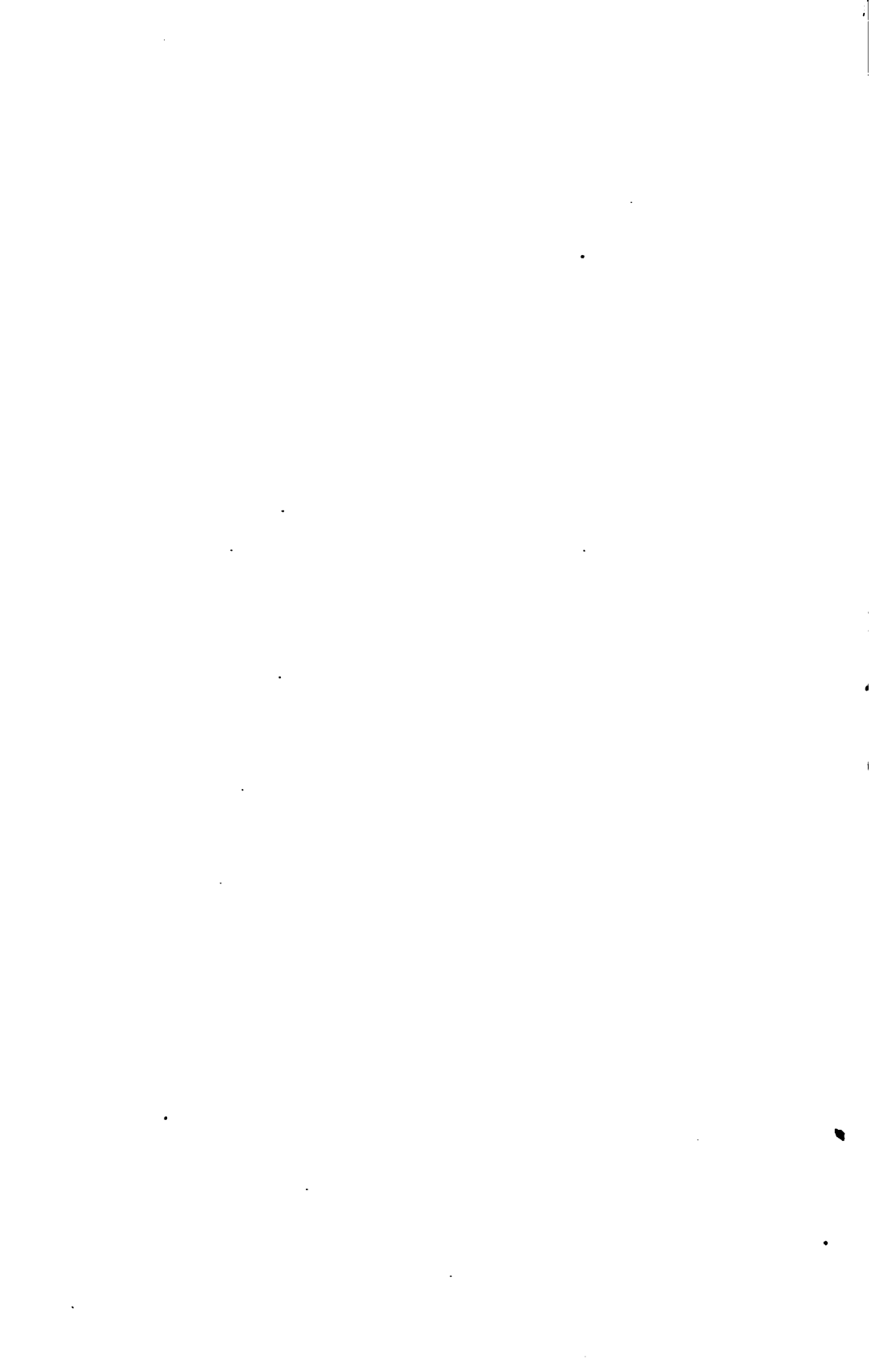


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THE
EMPLOYERS' LIABILITY^{C +}
ACTS

AND
THE ASSUMPTION OF RISKS

IN
NEW YORK, MASSACHUSETTS, INDIANA, ALABAMA,
PENNSYLVANIA, COLORADO, ENGLAND;
AND INCLUDING THE FEDERAL ACT

BY
FRANK F. ^{*Frank F.*}DRESSER, A. M.
OF THE MASSACHUSETTS BAR

VOLUME II

ST. PAUL, MINN.
THE KEEFE-DAVIDSON COMPANY
1908

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PREFACE.

The recent decisions have defined more closely the phrases of the Employers' Liability Act, and without adding much new law in the doctrine of assumption of risks, have greatly multiplied examples. The recent legislation has tended to amplify the remedies of workmen by restricting or abolishing the defense of fellow service, as in the New York Railroad Act of 1906, the Pennsylvania Statute of 1907 and the Federal Employers' Liability Act, and by removing the defense that a servant merely by remaining at work, without knowledge, assumes the risk of a danger created by the master's default, a provision very commonly inserted in safety appliance statutes, and recently added to the Alabama Code. Happily the ounce of prevention is being more generally applied by the adoption of child labor inspection and safety appliance regulations. Legislation of this character renders necessary a more thorough understanding of the doctrine of assumption of risk, and a more precise definition of the several defenses that pass loosely under that name.

This book attempts to gather and present the new matter of decision and legislation for the past five years in the form of a Supplement to an earlier volume entitled "The Employers' Liability Acts and the Assumption of Risks" published in 1902. The chapters

and sections of this book correspond with the chapters and sections of the earlier volume, and in the margin of the pages here will be found black letter paging and note numbers which refer to such pages and notes in the earlier volume. The new matter has been placed here under the same chapter, section, page and note (the two latter being the black letter in the margin, and not the foot paging), where such matter would properly go in the earlier volume could it be extended to include it. Thus, if a point is found in the first volume, notice the section, page and note where it appears, and turn to the same section number here, then in the margin find the black letter paging and note which correspond with the page and note of the earlier volume and the recent cases will be found, or, conversely, if a case is found here and the earlier rulings are wanted, see under what section, black letter paging and note it comes, and turn to the corresponding section, page and note in the original volume. For example: Cases upon the question whether a servant carried to or from his work by his master is in the employment during that time, are found in the earlier book, at sec. 13, page 75, note 158. Consequently, later cases upon that point will be found by looking in this book under sec. 13, at the marginal black letter paging "p. 75, n. 158" (found in foot paging 29). Sometimes the latter cases are umerous, as in sec. 95, and then here, as in the original book, the note under which most of the cases come has been subdivided into titles, and the black letter paging in such case refers to the page of the original volume where such title occurs.

The foot paging of this volume is necessary only

when the Table of Cases or Index is used, each of which refers to the foot paging, and not to the marginal black letter paging. The Index covers both the original volume and this. The Appendix contains the Revised Alabama Code of 1907, the New York Railroad Act of 1906, the Pennsylvania Liability Act of 1907, and the Federal Employers' Liability Act of 1906, with decisions and comments thereon.

The book attempts to include all decisions from the earlier volume to the first of January, 1907, and, so far as practicable, cases since that date. Frequently earlier cases, particularly New York decisions on the assumption of risk at common law, are also included. Where the only citation in the text is to the Reporter system, the reference to the State report is given in the Table of Cases if the report is now published.

FRANK F. DRESSER.



VOL. II.

EMPLOYERS' LIABILITY.

CHAPTER I.

THE EMPLOYERS' LIABILITY ACTS.

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- 15. Concurring Negligence of Fellow Servant.**

Section 1. The Common Law.*

p. 6. Master may be liable at common law for failing to furnish men enough to do the work. *Alabama G. S. R. Co. v. Vail*, 142 Ala. 134, 38 So. 124.

p. 9, n. 8. New York Laws 1902, c. 600. See Appendix. Congress passed an Employers' Liability Act

* 6 Curr. Law, 529.

approved June 11, 1906, applying to common carriers engaged in interstate commerce, but not following the English model. This act will be found at the end of the Supplement. See, also, Pennsylvania Act approved June 10, 1907, and New York Acts 1906, c. 657, at end of supplement.

p. 10, n. 10. See Workmen's Compensation Act of 1906, 6 Edw. VII, c. 58.

Section 2. Effect of the Act.*

p. 16, n. 13. New York Laws 1902, c. 600, § 1, cl. 2. "The employe, or in case the injury results in death the executor or administrator . . . shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of nor in the service of the employer nor engaged in his work." The Federal Act of June 11, 1906, does not contain such a provision.

p. 16, n. 15. An employe under the act is like an invited person. *Bellegarde v. Union, B. & P. Co.*, 41 Misc. 106, 83 N. Y. S. 825; 90 App. Div. 577, 86 N. Y. S. 72; *Id.*, 181 N. Y. 519.

p. 17, n. 17. Contributory negligence not affected by act. *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250. See, also, *Cleveland, C. C. & St. L. R. Co. v. Scott*, 29 Ind. App. 519; *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. S. 1090; *Hoehn v. Lautz*, 94 App. Div. 14, 87 N. Y. S. 921.

p. 17, n. 18. *American Rolling Mills Co. v. Hullinger*, 161 Ind. 673; *Pittsburgh, C. C. & St. L. Ry. Co. v. Lightheiser*, 163 Ind. 247, 78 N. E. 1033. The com-

* 6 Curr. Law, 562.

plaint "does not . . . impute negligence or other wrong to any fellow-servant of the intestate, and is, therefore, not brought under the employer's act." Northern Ala. R. Co. v. Mansell, 138 Ala. 548.

p. 18, n. 24. American Rolling Mills Co. v. Hullinger, 161 Ind. 673.

p. 18, n. 24. New York Laws 1902, c. 600, § 3, relates to the assumption of risks and will be considered, *infra* § 117. The provision has caused some difference of opinion whether it applied generally to all cases of negligence on the part of the master, as was held in Ward v. Manhattan R. Co., 95 App. Div. 437, 88 N. Y. S. 758, or applied only to cases brought under the act, as held in O'Neil v. Karr, 110 App. Div. 571, 97 N. Y. S. 148.

p. 19, n. 25. The act extended the liabilities of employers. O'Neil v. Karr, 110 App. Div. 571, 97 N. Y. S. 148. "We think that the object was, and the effect of subdivision 2 of section 1, p. 1749, of the employers' liability act, is to take from the employer this defense of common employment where the injury results to an employe through the negligence of one whose sole or principal duty is that of superintendence." Bellegarde v. Union, B. & P. Co., 90 App. Div. 577, 86 N. Y. S. 72; *Id.*, 181 N. Y. 519. The act "was undoubtedly intended to make the employer liable for the acts of a superintendent while engaged in the act of superintendence." Quinlan v. Lackawanna Steel Co., 107 App. Div. 176, 94 N. Y. S. 942.

In Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 86 N. Y. S. 49, it was thought that the act extended the liabilities of employers and imposed new remedies

and gave a new cause of action not existing at common law for the negligence of a superintendent. See, also, *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Harris v. Baltimore, M. & E. Wks.*, 188 N. Y. 141. The act creates no new liability for failure of the master to make proper rules. *Ward v. Manhattan R. Co.*, 95 App. Div. 437, 88 N. Y. S. 758.

p. 22, n. 28. See *supra* n. 25. *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49. See *Crosby v. Lehigh Valley R. Co.*, 128 Fed. 193, where it was said that the New York courts held that the act repealed all other remedies and required notice. Common-law remedies not taken away. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. S. 657; *Severson v. Hill-Warner-Fitch Co.*, 101 N. Y. S. 808. *Infra* n. 30.

p. 23, n. 30. It was at first thought in New York that the employers' liability act was a statute of general application and, therefore, to enable a servant to maintain any action against his master for negligence he must have given notice of injury as provided in the statute. Thus in *Johnson v. Roach*, 83 App. Div. 351, 13 N. Y. Ann. Cas. 86, 82 N. Y. S. 203, where the action was based on the Labor Law for the fall of a scaffold it was held that notice must have been given in order to maintain the action. (Apparently followed in *Stahl v. Schoonmaker*, 84 N. Y. S. 239.) See *Crosby v. Lehigh Valley R. Co.*, 128 Fed. 193. So in *Gmaehle v. Rosenberg*, where a scaffold fell and the complaint failed to aver the giving of notice, the court in 80 App. Div. 541, 80 N. Y. S. 705, held the complaint bad. In 40 Misc. 267, 81 N. Y. S. 930, the court said, however, that as this action was brought under the Labor Law

which did not require notice a notice need not be given and that the act merely extended liability without taking away any cause of action. But in 83 App. Div. 339, 82 N. Y. S. 366, the contrary was held, that the act applied to all actions brought by a servant whether under a statute or at common law and in any case notice must be given; and this was affirmed 87 App. Div. 631, 84 N. Y. S. 1127, and reversed by 178 N. Y. 147.

Now, however, doubts are set at rest by the decision in *Gmaehle v. Rosenberg*, 178 N. Y. 147, holding that where the liability is at common law it is unnecessary to allege notice. "The legislature deeming that by the act it was about to extend the liabilities of masters to their servants (to what extent they effectuated this purpose it is unnecessary now to determine) thought it wise to safeguard the new liabilities by requiring that notice should be given the master of the accident for which it was sought to recover compensation. But it was only the new or extended liability that it was intended to subject to such safeguard. This intent is clearly expressed when the legislature limited the requirement for notice to injuries or death 'under this act.' " Accordingly, where the plaintiff makes out a case good at common law, he need not allege the giving of a notice. *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49; *Schermerhorn v. Glens Falls P. C. Co.*, 94 App. Div. 600, 88 N. Y. S. 407. *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247 (Colorado Act). And in such case the notice if alleged may be rejected as surplusage. *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337. So in a case under

the Labor Law for breaking of scaffold, notice need not be given. *Williams v. Roblin*, 94 App. Div. 177, 87 N. Y. S. 1006. So if the complaint state a cause of action for wrongful death under Code Civ. Proc. § 1902, notice is immaterial even if giving of it is alleged. *Holm v. Empire Hardware Co.*, 102 App. Div. 505, 92 N. Y. S. 914. The act is a cumulative remedy, and, where a common-law count is joined with a count under the act, the plaintiff cannot be required to elect before trial. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. S. 657. When the complaint sets out a cause of action at common law, the essentials of the act need not be alleged. *First Nat. Bk. v. Chandler*, 39 So. 822. But, of course, when the complaint is under the statute, the plaintiff must bring himself within its provisions. As to whether a plaintiff having taken some proceedings under the English Workmen's Compensation Act is thereby barred from proceeding under the Employers' Liability Act, see *Edwards v. Godfrey* [1899] 2 Q. B. 333; *Isaacson v. New Grand (C. J.) Ltd.* [1903] 1 K. B. 539; *Taylor v. Hamstead C. Co.* [1904] 1 K. B. 838; *Rouse v. Dixon* [1904] 2 K. B. 628.

p. 24, n. 32. Master and servant may be sued jointly for negligence of the servant committed in the master's service. If the complaint is such that unless the servant was negligent the master could not be found guilty, an instruction that the jury might find in favor of the servant and against the master is wrong. *Indiana N. & T. Co. v. Lippencott Glass Co.*, 165 Ind. 361. Master and servant may be joined. *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95 (same parties as in *Charman v. Lake Erie & W. R. Co.*, 105 Fed. 449, cited

in this note). See *Helms v. Northern Pac. R. Co.*, 120 Fed. 389. That negligent servant is not answerable for injury caused to a passenger, see *Bryce v. Southern R. Co.*, 125 Fed. 958, a case which seems contra to the weight of authority. An article on "Joint or Several Liability of Master and Servant as Affecting Removal of Causes," will be found in 54 Cent. L. J. 404. Where state statute permits such joinder the controversy is not separable so as to allow removal. *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221. And even if such joinder is improper the controversy is not separable. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206. See, also, *Thomas v. Great Northern R. Co.* [C. C. A.] 147 Fed. 83.

p. 24, n. 33. See *Boston Woven Hose & R. Co. v. Kendall*, 178 Mass. 232, where defendant sold and warranted to plaintiff a boiler which through a defect discoverable by plaintiff upon reasonable inspection burst injuring plaintiff's employes. Plaintiff having paid damages to its employes is allowed to recover against defendant on the ground that its failure to inspect was induced by reliance on the reputation and warranty of defendant; and quære whether plaintiff's employes could have action against defendant.

Compare *Lebourdais v. Vittrified Wheel Co.* [Mass.] 80 N. E. 482, where injured servant sued the seller.

Section 3. Construction of the Act.*

p. 25, n. 34. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673. Statute is remedial though in derogation of the common law and should be liberally con-

* 6 Curr. Law, 562.

strued. *Hunt v. Conner*, 26 Ind. App. 41. As the act is in derogation of the common law it should be strictly construed. *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. S. 148.

p. 27, n. 39. *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247; *Reinke v. Northern Pac. R. Co.*, 145 Fed. 988 (Montana R. R. statute); *Jarvis v. Hitch*, 161 Ind. 217; *Bellegarde v. Union, B. & P. Co.* 90 App. Div. 577, 86 N. Y. S. 72; *Id.*, 181 N. Y. 519; *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Alabama S. & W. Co. v. Griffin*, 42 So. 1034 (construction of railroad statutes followed in "charge or control" clause).

p. 28, n. 40. Laws 1902, c. 600, § 1, New York. "Where, after this act takes effect, personal injury, etc." As to Federal Act see end of Supplement.

Section 4. Constitutionality of the Act.

p. 29, n. 43. *Terre Haute & I. R. Co. v. Rittenhouse*, 28 Ind. App. 633; *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 78 N. E. 1033; *Cincinnati, H. & D. R. Co. v. Thiebaud* [C. C. A.] 114 Fed. 918.

p. 29, n. 44. The Coal Mines Act of Penn. June 2, 1891, was held unconstitutional so far as it prescribed the duties of the mine foreman employed by the owner and then made the owner liable for the foreman's negligence. *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193. Some cases are collected in 21 Am. & Eng. R. R. Cas. [N. S.] 925. See *Martin v. Pittsburgh & L. E. R. Co.*, 203 U. S. 284.

p. 30, n. 45. *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 86 P. 313 (Colo. Act of 1901, Sess. Laws, p. 161). It "does not deprive him of any defense to

the liability thereby imposed which, under the established rules of law, could be regarded as sufficient save and excepting his own lack of negligence."

p. 31, n. 46. *Cincinnati, H. & D. R. Co. v. Thiebaud* [C. C. A.] 114 Fed. 918; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 86 P. 313 (Colo. Act of 1901, Sess. Laws, p. 161). Ohio statute as to railroad servants, 87 Ohio Laws, p. 149, is a reasonable classification. *Kane v. Erie R. Co.* [C. C. A.] 133 Fed. 681, reversing 128 Fed. 474. Minnesota statute relating to railroads applies to a mining company operating a short line and is within the police power of the state. *Kibbe v. Stevenson Iron Min. Co.* [C. C. A.] 136 Fed. 147. The Minnesota statute excepting incomplete roads not open to public travel from its provisions does not deny equal protection of the laws. *Minnesota Iron Co. v. Kline*, 199 U. S. 593. The Employers' Liability Act of Indiana does not violate the Fourteenth Amendment since corporations are not citizens of the United States and therefore their privileges are not abridged. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 78 N. E. 1033. As to validity of statutes forbidding contracts waiving liability, see *infra* § 25 n. 155. The Minnesota railroad statute is construed by the state court to apply to railroad dangers rather than to railroads themselves and, therefore, the exception from its provisions of incomplete roads not open to public travel is valid. *Minnesota Iron Co. v. Kline*, 199 U. S. 593. The Indiana Employers' Liability Act refers to dangers of railroads rather than to the persons or corporations which operate them and, therefore, railroads are properly classed by themselves. *Pittsburgh, C. C. & St. L. R. Co. v.*

Lightheiser, 163 Ind. 247, 78 N. E. 1033. But the Indiana Act is unconstitutional and violates the 14th amendment on the ground that it imposes burdens on corporations not imposed on individuals or partnerships conducting a like business, and this is improper classification. Bedford Quarries Co. v. Bough [Ind.] 80 N. E. 529, citing many cases. Compare this with the Lightheiser case, *supra*, which saved the act with reference to railroads by ruling that it applied to railroad dangers and did not base its classification on the character of the master. The Indiana Employers' Liability Act does not violate the Fifth Amendment since this does not apply to the states. Pittsburgh, C. C. & S. L. R. Co. v. Lightheiser, 163 Ind. 247, 78 N. E. 1033. Although the plaintiff had been employed for 27 years, yet as he had no contract right for the future the Employers' Liability Act is not invalid as impairing the obligation of contracts. Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 163 Ind. 247, 78 N. E. 1033. Neither is it an ex post facto law. *Id.*

p. 32, n. 49. As to the constitutionality of the Federal Employers' Liability Act, see end of Supplement.

p. 33, n. 52. In *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49, a majority of the judges held that as the State Constitution provides that no citizen shall be deprived of any rights or privileges save by the law of the land or by judgment of his peers and also that executors and administrators shall have the same right to recover for decedent's death that the latter would have if he had not died, the Act by requiring executors and administrators to give notice in order to maintain an action violates the Constitution if this.

provision is construed to apply to actions at common law, but does not violate the Constitution if it is construed only as a condition of a new right of action; and it is so to be construed. If the former construction were adopted, the statute would also violate the Fourteenth Amendment. This holding was neither approved nor disapproved in *Gmaehle v. Rosenberg*, 178 N. Y. 147, which in other respects approved the above case. See, also, *Gmaehle v. Rosenberg*, 83 App. Div. 339, 82 N. Y. S. 366, which held that the statute did not violate the provision in the Constitution relating to injuries resulting in death.

Section 5. Effect of Act in Federal Courts.

p. 34, n. 53. *Jones v. Southern Pac. Co.* [C. C. A.] 144 Fed. 973; *Pennsylvania Co. v. Fishack* [C C. A.] 123 Fed. 465.

p. 35, n. 54. *Dormidy v. Sharon Boiler Wks.*, 127 Fed. 485 (Alabama Act); *Crosby v. Lehigh Valley R. Co.*, 128 Fed. 193 (New York Act); *Yarrington v. Delaware & H. Co.*, 143 Fed. 565 (Pennsylvania railroad statute); *Sander's Adm. v. Louisville & N. R. Co.* [C. C. A.] 111 Fed. 708 (that action fails on decease of beneficiary). Where a state statute permits master and negligent servant to be joined as defendants, the controversy is not separable so as to allow removal to the United States courts, since the states have power to regulate actions for negligence. *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221. See, also, *Alabama, G. S. R. Co. v. Thompson*, 200 U. S. 206.

p. 35, n. 55. Conversely where there is concurrent jurisdiction and a United States statute applies, the State court must follow the interpretation placed upon the statute by the United States courts. *Chesley v. Nantasket Beach Steamboat Co.*, 179 Mass. 469.

Section 6. Jurisdiction of Federal Courts.*

p. 36, n. 58. *The Noddleburn*, 28 Fed. 855. Jurisdiction of torts on the high seas is in the United States courts irrespective of citizenship of parties or vessel.

p. 37, n. 60. A steamship was owned in New Jersey but registered in New York, While on the high seas a passenger was washed overboard. Below it was held that the death statute of New York governed [*Lindstrom v. International Nav. Co.*, 117 Fed. 170] but this was reversed and it was held on appeal that the vessel was New Jersey territory and subject to the laws of that state. *International Nav. Co. v. Lindstrom* [C. C. A.] 123 Fed. 475. See, also, *The Hamilton*, *The Saginaw* [C. C. A.] 146 Fed. 724. In a collision on the high seas between a British ship and a foreign ship whereby a foreigner was killed, the representative of the deceased foreigner might have a right of action against the British vessel under the Fatal Accident Act. *Davidsson v. Hill* [1901] 2 K. B. 606.

p. 37, n. 62. It was urged that the violation by the plaintiff of a statute of the United States relating to signals in fog contributed to the collision in which he was injured and it was held the state court must follow the interpretation put upon the statute by the

* 7 Curr. Law, 32.

United States courts and its decision may be reviewed by the Federal court. *Chesley v. Nantasket Beach Steamboat Co.*, 179 Mass. 469.

p. 37, n. 63. An injury suffered by a passenger while going from a wharf to a vessel through the careless management of a gangplank is not a maritime tort and a court of admiralty has no jurisdiction. *The Albion*, 123 Fed. 189.

p. 38, n. 66. *Lindstrom v. International Nav. Co.*, 117 Fed. 170; *International Nav. Co. v. Lindstrom* [C. C. A.] 123 Fed. 475. See, also, *Davidsson v. Hill* [1901] 2 K. B. 606.

Section 7. Conflict of Laws.*

p. 39, n. 67. Plaintiff, a resident of Connecticut, sued a Connecticut corporation, having a place of business in Massachusetts, in the Massachusetts court, for an injury which happened in Connecticut, and it was held that, assuming the jurisdiction of the court, the plaintiff could recover if he could have recovered in Connecticut, and Connecticut common law was proved. *Bence v. New York, N. H. & H. R. Co.*, 181 Mass. 221. Plaintiff, a resident of Connecticut, and hurt there by the negligence of a Connecticut corporation, brought suit against the corporation in New York. Held, that the court had jurisdiction to hear this action at common law, and the New York Employers' Liability Act did not apply. *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337. Where injury happened in Mexico the laws of that country govern though the parties

* 7 Curr. Law, 681.

are citizens of the United States and action is brought here. *Mexican Nat. R. v. Slater* [C. C. A.] 115 Fed. 593, 194 U. S. 120.

p. 39, n. 68. Law of the place of injury governs. *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; *Christiansen v. Garver Tank Wks.* [Ill.] 79 N. E. 97; *Debevoise v. New York, L. E. & W. R. Co.*, 98 N. Y. 377 (New York death statute). See, also, *Carr v. Francis Times & Co.* [1902] A. C. 176. Employers' Liability Acts have no extraterritorial effect. *Baltimore & O. S. R. Co. v. Reed*, 158 Ind. 25; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337.

p. 40, n. 69. Court will presume the common law of a sister state to be the same as its own. *Baltimore & O. S. R. Co. v. Reed*, 158 Ind. 25; *Baltimore & O. S. R. Co. v. Jones*, 158 Ind. 87. In absence of proof it is presumed that the common law prevails in every state having a common-law origin. *Mueller v. Mueller*, 127 Ala. 356. Any variation in another state of the common law as understood in the forum must be proved as a fact. *Bence v. New York, N. H. & H. R. Co.*, 181 Mass. 221. The maritime law of a foreign nation must be alleged and proved. *The Matterhorn* [C. C. A.] 128 Fed. 863. It is a question of fact what the common law of a foreign state is; but so far as it appears in statutes and decisions which are not conflicting the construction of the language is for the court. *Cook v. Bartlett*, 179 Mass. 576. It is not sufficient to introduce the statutes without showing their construction by the courts, and lawyers should testify. *In re International Mahogany Co.* [C. C. A.] 147 Fed. 147. Foreign statute must be proved as a fact. *Mexican Nat. R. v. Slater* [C. C. A.]

115 Fed. 593, 194 U. S. 120; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10. Court will not presume that foreign state has a statute similar to that of forum. *Debevoise v. New York, L. E. & W. R. Co.*, 98 N. Y. 377.

p. 42, n. 72. *Smith v. Empire State-Idaho M. & D. Co.*, 127 Fed. 462; *International Nav. Co. v. Lindstrom* [C. C. A.] 123 Fed. 475; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, where the injury happened in Illinois and the action was based on the Illinois death statute and also a statute of that state relating to the to the ringing of bells at crossings, etc. *Mexican Nat. R. v. Slater* [C. C. A.] 115 Fed. 593, 194 U. S. 120; *Burn's Rev. St. Indiana 1901*, § 7086, cl. 4, has been held unconstitutional. See *infra*, n. 76. The English rule differs from that of the United States. See *infra*, n. 78.

p. 42, n. 73. Where the tortious act was committed on a vessel and death resulted by drowning on the high seas, the law in force on the vessel and not that of the high seas governed. *Lindstrom v. International Nav. Co.*, 117 Fed. 170; [C. C. A.] 123 Fed. 475.

p. 43, n. 74. *Pennsylvania Co. v. Fishack* [C. C. A.] 123 Fed. 465; *Dormidy v. Sharon Boiler Wks.*, 127 Fed. 485.

p. 44, n. 75. *El Paso & N. W. R. Co. v. McComas* [Tex. Civ. App.] 72 S. W. 629.

p. 44, n. 76. This provision of the Indiana act has been declared unconstitutional on the ground that the statute takes away a vested right of defense and is, therefore, depriving one of property without due process of law. Perhaps a better reason is that as the ac-

tion must be governed by the law of the place where the injury happened an attempt to make an act, if lawful where committed, unlawful by virtue of a statute of the forum, is extraterritorial legislation and, therefore, not due process of law. See note in 15 Harv. L. R. 747. The statement to the contrary in *Whitford v. Panama R. Co.*, cited below, n. 77, is dictum.

p. 45. The second line of the second paragraph of the text should read "to give a cause of" instead of "have gone to the other."

p. 45, n. 78. British goods on a British ship were seized within the jurisdiction of the Sultan of Muscat and a court in Muscat held the seizure lawful under the laws in force there. It was held that as this was a lawful act in Muscat it could not be held unlawful in England, Lord Macnaghten saying (p. 182) "In order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and secondly, the act must not have been justifiable by the law of the place where it was committed. In the present case the whole question turns upon the second proposition." *Carr v. Francis Times & Co.*, 1902 A. C. 176. If a recovery for a wrongful act may be had under English laws, if it had occurred in England, then there may also be a recovery under such laws though the act occurred in a foreign jurisdiction, unless legally justifiable there,—a rule which differs from that obtaining in the United States where recovery must be based solely on *lex loci delicti*. Thus where a British ship collided with a Norwegian vessel on the high seas and

a Norwegian seaman was killed it was held that his representatives could recover under the English Fatal Accidents Act; that it was not necessary that recovery should be possible under the Norwegian law. *Davidson v. Hill* [1901] 2 K. B. 606. *Supra* n. 72.

p. 46, n. 79. *Leman v. Baltimore & O. R. Co.* 128 Fed. 191.

p. 46, n. 80. *Strauss v. New York, N. H. & H. R. Co.*, 91 App. Div. 583, 87 N. Y. S. 67. Plaintiff, a citizen of Texas, made in Texas a contract with the Pullman Company exempting it and any railroad over which its cars might run from liability for injury to him. He was hurt in Mexico and brought suit in Texas. By Texas law this contract was void and it was so held by the Texas court and the fact that the injury happened in Mexico was immaterial. *Mexico Nat. R. Co. v. Jackson* [C. C. A.] 118 Fed. 549. Plaintiff and his intestate were citizens of Pennsylvania and plaintiff brought suit in Ohio to recover for death of his intestate in Pennsylvania, basing his action on the Pennsylvania death statute. It was held that as this differed from the Ohio statute in the party to sue and the limitation of time and amount it could be enforced only by comity and if such a course accorded with the policy of the state. An Ohio statute provided that if a citizen of Ohio was killed in a foreign state the statutory law of that state should be enforced in Ohio. This showed that the policy of the state was to limit the enforcement of foreign statutes to actions brought by Ohio citizens and as plaintiff was not a citizen of Ohio he could not recover. *Baltimore & O. R. Co. v. Chambers* [Ohio] 76 N. E. 91. Vermont will enforce Canadian statute though the lat-

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ter provides, contrary to the Vermont rule, that neither contributory negligence nor assumed risk is a bar to action. *Morisette v. Canadian Pac. R. Co.* [Vt.] 56 A. 1102. Michigan will enforce the Canadian Employes' Liability Act though it creates rights unknown to Michigan law. *Rick v. Saginaw Bay Towing Co.* [Mich.] 93 N. W. 632. New York will enforce foreign statute. *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10 (though party to sue is different and it does not limit amount of recovery); *Boyle v. Southern P. R. Co.*, 36 Misc. 289, 73 N. Y. S. 465 (though it permits recovery for suffering). Compare *Kahl v. Memphis R. Co.*, 95 Ala. 337; *Louisville & N. R. Co. v. Williams*, 113 Ala. 402.

p. 49, n. 83. *Mexican Nat. R. Co. v. Slater* [C. C. A.] 115 Fed. 593. See, also, *Rick v. Saginaw Bay Towing Co.* [Mich.] 93 N. W. 632.

p. 49, n. 84. *Adams v. Fitchburg R. Co.*, 67 Vt. 76 (Mass. railroad statute); *Malloy v. American H. & L. Co.* [C. C. A.] 148 Fed. 482 (Mass. E. L. A.).

p. 50, n. 85. Death occurred in Mexico and the Mexican death statute provides that survivors are entitled to an alimony or pension during the period they would have been entitled to support by the deceased. Suit brought in Texas and the case was governed by the Mexican law, but as the Texas courts had no process by which the rights under this statute, that is periodical payments subject to change from time to time, could be carried out, the Mexican statute was "too dissimilar" to be enforced. *Mexican Nat. R. Co. v. Slater* [C. C. A.] 115 Fed. 593; *Id.*, 194 U. S. 120.

p. 51, n. 89. Where injury happens in a foreign state

and action is brought in Indiana, the Indiana statute as to the burden of proving contributory negligence applies. *Chicago, T. T. Co. v. Vandenburg*, 164 Ind. 470. Where foreign statute prescribed that contributory negligence and assumed risk should not be a bar to action but go in reduction of damages, this is part of the right of action and will be enforced outside the jurisdiction. *Morisette v. Canadian Pac. R. Co.* [Vt.] 56 A. 1102.

Section 8. Master and Servant.*

p. 52, n. 90. *Holmes v. Birmingham, S. R. R. Co.*, 140 Ala. 208.

p. 53, n. 94. *Walsh v. Reisenberg*, 89 N. Y. S. 58. A New York statute requires compulsory pilotage on vessels entering or leaving the port and, therefore, at common law a shipowner is not liable for the exclusive negligence of a pilot whose services he is required to accept. *Homer Ramsdell Transp. Co. v. La Compagnie Gen. Trans.*, 182 U. S. 406. Where by statute trustees managed a public building, the municipality is not liable for the negligence of an elevator man employed there. *Moest v. City of Buffalo*, 101 N. Y. S. 996.

p. 53, n. 95. Where defendant for a time had title to a mill and it was operated in his name as trustee but without his consent, he did not become a master. *Wright v. Bertiaux*, 161 Ind. 124. Where defendant was still a corporation but had sold its property and ceased to operate its road it was not a party or answerable to servant of purchaser who operated the road.

* 6 Curr. Law, 521, 531.

Williard v. Spartanburg, U. & C. R. Co., 124 Fed. 796. See, also, *Northern Ala. R. Co. v. Mansell*, 36 So. 459 (two companies sued but one had exclusive ownership of road).

p. 54, n. 96. One learning to be a brakeman and acting as such who when proficient is to become a brakeman, and meantime receives no wages, is a servant. *Alabama G. S. R. Co. v. Burks*, 41 So. 638. So of one learning to be a flagman and riding and working on cars. *Huntzicker v. Illinois Cent. R. Co.* [C. C. A.] 129 Fed. 548.

p. 55, n. 98. Plaintiff was foreman of defendant's switch crew and while backing train upon tracks owned by a depot company was injured by the negligence of depot company's switchman in setting switch. Defendant used track under contract with depot company but had no control over switches. Defendant also agreed that depot company should not be liable for negligence of its servants and would indemnify the depot company for any injury caused by depot company's employes in furtherance of defendant's business. Held this contract did not make depot company's employes servants of defendant and that defendant was not liable. *Brady v. Chicago & G. W. R. Co.* [C. C. A.] 114 Fed. 100.

p. 55, n. 99. Defendant's elevator man was expected to report defects in the elevator to the defendant or his agent and had no authority to remedy them himself or to hire help. The elevator becoming out of order he, without permission from the defendant, asked his brother-in-law, the plaintiff, to repair it. Plaintiff did the work without expectation of pay and without the

defendant's knowledge. He was killed by the fall of a hanger and it was held that the defendant owed him no duty to keep his premises safe. *Langan v. Tyler* [C. C. A.] 114 Fed. 716. Boy hired as driver but working without foreman's consent as digger. *Patterson v. Neal*, 135 Ala. 477. One who at the request of other servants goes to their assistance, without the knowledge of the master, and without expecting pay, does not become their fellow-servant. *Geibel v. Elwell*, 19 App. Div. 285, 46 N. Y. S. 76. Street car driver finding it necessary to get assistance so far represents the company that one whom he has called to help him and who is injured by his negligence may recover. *Marks v. Railway Co.*, 146 N. Y. 181. Boy helping his father at his work with consent of employer is a servant. *Ringue v. Oregon C. & N. Co.*, 44 Or. 407. As to authority of servant to employ a substitute or assistant, see *Aga v. Harbach* [Iowa] 102 N. W. 833.

p. 56, n. 100. Plaintiff was an employe of a machinery company and was sent to defendant to make repairs on his machines under the direction of his superintendent. Held plaintiff became defendant's servant and could not recover for the negligence of defendant's engineer, since he was a fellow-servant. *Delory v. Blodgett*, 185 Mass. 126. Defendant hired plaintiff and then put him to work under a contractor. The defendant paid the plaintiff but charged his wages to the contractor. Plaintiff was not defendant's servant. *Dallas Mfg. Co. v. Townes*, 41 So. 988. Defendant in general teaming business sent a team with a driver, whose wages he paid, to an electric light company daily, and this driver did what teaming the company wished and

sometimes other work. The arrangement was made between the company and the defendant. The driver while going on the order of the company injured the plaintiff. Held a question for the jury whether driver was defendant's servant. *Driscoll v. Towle*, 181 Mass. 416. See, also, *infra*, n. 102. Defendant's foreman went to paper company to build elevator and the paper company furnished the plaintiff and two men to help him. By foreman's negligence in regard to the place where he directed the plaintiff to work, the latter was injured. The foreman and plaintiff were co-servants and defendant liable for his vice-principal's negligence. *Parkhurst v. Swift*, 31 Ind. App. 521. Plaintiff in the employ of longshoremen was hurt by negligence of defendant's driver who with a horse had been furnished by defendant to plaintiff's master. The defendant kept horses and men for the purpose of letting them. The driver and plaintiff were fellow-servants. *Breslin v. Sparks*, 97 App. Div. 69, 89 N. Y. S. 627; *Quinn v. National Sugar Ref. Co.*, 102 App. Div. 47, 92 N. Y. S. 95.

p. 57, n. 102. A company hired of the defendant a van, horse, and driver, the defendant paying all charges and claims and being responsible for them, while the company paid a lump sum in monthly instalments to defendant. The van was used in delivering company's goods to its customers. While driver was delivering goods he injured plaintiff, no one representing the company being present or exercising control. Held, driver was at all times defendant's servant. *Waldock v. Winfield* [1901] C. A. 2 K. B. 596. Compare *Driscoll v. Towle*, 181 Mass. 416. Servant in employ of a transportation company sent to defendant to move powder

does not become defendant's servant. *Oulighan v. Butler*, 189 Mass. 287. Servant in employ of defendant elevator company sent to operate a hod elevator which had been installed for use of contractor and who injures one of the contractor's men is not a fellow-servant with plaintiff. *Mills v. Thomas El. Co.*, 54 App. Div. 124; *Id.*, 172 N. Y. 660. Servant sent to repair defendant's boilers is not a fellow-servant with latter's employes. *Olive v. Whitney Marble Co.*, 103 N. Y. 292. Defendant delivered cars to a company to be unloaded at a certain place where it was the company's duty to clean them. Plaintiff, an employe of the company, was carried on defendant's cars to this place to do the cleaning and while being transported was injured. The plaintiff was a passenger and not a servant of the defendant. *Holmes v. Birmingham S. R. R. Co.*, 140 Ala. 208. See, also, *Hale v. New York, N. H. & H. R. Co.*, 190 Mass. 84; *Harrington v. Erie R. Co.* 79 App. Div. 26, 79 N. Y. S. 930. Where stevedores contract to unload a vessel and the vessel furnishes a winch and winchman, the servants of the stevedores are not fellow-servants of the winchman. *The Gladestry* [C. C. A.] 128 Fed. 591; *The City of San Antonio*, 135 Fed. 879. Even where stevedores directed the winchman about the work and indirectly paid his wages. *The Slingsby* [C. C. A.] 120 Fed. 748. Contra, *The Elton* [C. C. A.] 142 Fed. 367. But if the ship crew is hired by the stevedore they become fellow-servants with his other employes. *The Turquoise*, 114 Fed. 402. Where plaintiff was employed by A to sew bags on defendant's wharf and was hurt by negligence of defendant's servants in unloading a lighter owned by B, they were not fellow-

servants. *Ford v. Arbuckle*, 107 App. Div. 221, 94 N. Y. S. 1097. See, also, *supra*, n. 100.

p. 57, n. 103. *Driscoll v. Towle*, 181 Mass. 416. Where there was some evidence that plaintiff had been hired by defendant's foreman and was on his way to find the place in which he was to work when he was hurt, the question whether he had become a servant was for the jury. *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152.

Section 9. Independent Contractor.*

p. 59, n. 106. *Fitzpatrick v. Evans & Co.* [1902] 1 K. B. 505 (C. A.). Where the work is intrinsically dangerous, as blasting near a highway, the employer may be liable. *Falender v. Blackwell* [Ind. App.] 79 N. E. 393. Where a corporation without capital and with the same officers is formed to carry out the work which an independent contractor has agreed to do, the contractor may be liable on the ground that the corporation is fictitious. *Holbrook-Cabot-Rollins Corp. v. Perkins* [C. C. A.] 147 Fed. 166. When the work entails a specific duty, as where a street is obstructed. *Johnston v. Phoenix Bridge Co.*, 169 N. Y. 581.

p. 59, n. 107. *Wagner v. Boston Elevated R. Co.*, 188 Mass. 437; *McDonough v. Pelham Hod El. Co.*, 98 N. Y. S. 90; *Arthur v. Texas & P. R. Co.* [C. C. A.] 139 Fed. 127. A contractor was delivering machinery to defendant and the plaintiff was helping him as a volunteer and was hurt by failure of defendant to furnish suitable appliances. Plaintiff alleged that he was defendant's servant and it was held that he was not.

* 6 Curr. Law, 533; 8 Curr. Law, 176.

Busby v. Anderson W. L. & P. Co. [C. C. A.] 136 Fed. 156. See Murphy v. Perlstein, 73 App. Div. 256, 76 N. Y. S. 257, failure to guard an excavation.

p. 59, n. 108. Dallas Mfg. Co. v. Townes, 41 So. 988; Wagner v. Boston Elevated R. Co., 188 Mass. 437; Sullivan v. New Bedford G. & E. L. Co., 190 Mass. 288; Moran v. Carlson, 95 App. Div. 116, 88 N. Y. S. 520.

p. 60, n. 109. New York.

p. 60, n. 111. Plaintiff employed by an independent contractor was hurt by coal falling on him from defendant's traveling tub, an automatic device which was not properly balanced but which was not out of repair. Held plaintiff could not recover as defendant was not negligent and the danger was obvious. The court said: "The effect of R. L. c. 106, § 76, is, in our opinion, to make certain that the intervening contract does not prevent the owner's owing a duty directly to the employe of the contractor. We do not think that it was intended to 'enlarge the liability' of the owner (as was said in Toomey v. Donovan, 158 Mass. 232, 236). In that respect § 76 is like the first clause of § 71 of R. L. c. 106. Further we are of opinion that the duty of the owner to the employe of the contractor is the duty owed by an employer to his own employe in such a case. In case of permanent apparatus to be used by an employe, there is an invitation on the part of the owner to use the apparatus. But it is an invitation to use the apparatus then used by the owner. That being the invitation, no duty grows out of that employment to buy a new and better machine, or, as it is usually said, the employe as a matter of contract assumes all obvious risks incident to the use of the apparatus on which he

is employed to work. The same is true in case the work is to be done by an independent contractor. The invitation held out by the owner by making a contract for work to be done with his apparatus is to use that apparatus and not another apparatus. If an employe of the contractor accepts that invitation, no duty grows out of that invitation and the acceptance of it to buy a new or better apparatus." *Sullivan v. New Bedford G. & E. L. Co.*, 190 Mass. 288. See *Callahan v. Trustees of Phillips Academy*, 180 Mass. 183; *Wingert v. Krakauer*, 92 App. Div. 223, 87 N. Y. S. 261.

Section 10. Who are Servants.*

p. 61, n. 114. *Simonds v. Georgia I. & C. Co.*, 133 Fed. 776.

p. 62, n. 117. *Fort Wayne Gas Co. v. Nieman*, 33 Ind. App. 178. The act has been construed to cover railroad dangers and to apply to them rather than to railroad corporations. Thus "it applies to every corporation, company, co-partnership or person engaged in the dangerous and hazardous business of operating a railroad, and their employes who are engaged in such dangerous and hazardous work." *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 78 N. E. 1033.

p. 63, n. 119. Seamstress comes within the act. *Maynard v. Peter Robinson Ltd.*, 89 L. T. 136. One of two men operating sailing barge on the Thames is a "seaman" and so not within the act. *Corbett v. Pearce* [1904] 2 K. B. 422.

* 6 Curr. Law, 531.

Section 11. Who are Masters.

p. 63, n. 121. *Linton v. Hurley*, 14 Gray (Mass.) 191.

p. 66, n. 132. After beginning the action receiver was discharged and turned over the property in his hands to the railroad succeeding the corporation over which he was appointed. This is a good defense. *McGhee v. Willis*, 134 Ala. 281.

p. 66, n. 133. *Baltimore & O. R. Co. v. Burris* [C. C. A.] 111 Fed. 882. Where injury happened after the foreclosure sale but while receiver still operated road and it was provided that purchaser should take the property subject to liabilities incurred by receiver before delivery and, after delivery, the receiver was ordered to defend, both the purchaser and the receiver were proper parties. *Denver & R. G. R. R. Co. v. Gunning*, 33 Col. 280.

p. 67, n. 137. *Hunt v. Conner*, 26 Ind. App. 41.

Section 12. Act Applies to Municipal Corporations.*

p. 69, n. 141. Board of education was given charge of school property and a pupil was injured by fall of plaster from ceiling. Held plaintiff might recover. Case does not rest on governmental obligation to benefit the public by education but on the local and ministerial duty resting upon defendant and all other persons who possess and manage property to keep it in reasonably safe condition for persons properly resorting to it. The city of New York is not liable for defendant's negligence. *Wahrman v. Board of Education*, 111 App. Div. 345, 97 N. Y. S. 1066. Elevator

* 6 Curr. Law, 735.

man in building used for public purpose by city and county, and managed by trustees appointed under a statute, was negligent. Neither city nor county was liable. *Moest v. City of Buffalo*, 101 N. Y. S. 996. Municipal fire works. *Tindley v. City of Salem*, 137 Mass. 171.

p. 70, n. 143. Town working quarry to get stone for streets and also selling some is liable. *Duggan v. Inhabitants of Peabody*, 187 Mass. 349.

p. 71, n. 145. *Foster v. City of Greeley*, 15 Colo. App. 176; *Thompson v. City of Worcester*, 184 Mass. 354.

p. 71, n. 147. *Lord v. Inhabitants of Wakefield*, 185 Mass. 214.

p. 71, n. 148. If the superintendent of streets in a town is personally negligent in blasting he may be held personally liable. *Moynihan v. Todd*, 188 Mass. 301. Where corporation agreed to rebuild bridge and share expense with town, it was a question for the jury whether it was an agent of the municipality or a principal. *James Ramage Paper Co. v. Bulduzzi* [C. C. A.] 147 Fed. 151.

p. 72, n. 150. *Corbett v. St. Vincent's Indus. School*, 79 App. Div. 334, 79 N. Y. S. 369.

p. 72, n. 153. *Big Stone Gap Co. v. Ketron*, 102 Va. 23; *Haggerty v. St. Louis R. Co.*, 100 Mo. App. 424.

Section 13. There Must of Necessity be Actual Employment.*

p. 74, n. 156. Where an employe after his day's work took a hand car and went to town on his own busi-

* 6 Curr. Law, 531.

ness and struck a horse at a crossing he was not at the time a servant of the defendant. *Harrell v. Cleveland, C. C. & St. L. R. Co.*, 27 Ind. App. 29. Plaintiff, a section hand, who lived in section house near track, after working hours crossed track to go to station on his own business and was killed by negligent management of train. Held (it would seem wrongly) that he was a servant and could not recover for a fellow-servant's fault. *Dishon v. Cincinnati, N. O. & T. P. R. Co.*, 126 Fed. 194.

p. 75, n. 158. Employes carried to and from their work in defendant's trains are still in his service. *Ohio & N. R. Co. v. Tindall*, 13 Ind. 366; *Indianapolis & G. R. Transit Co. v. Andis*, 33 Ind. App. 625; *Baltimore & O. S. W. R. Co. v. Clapp*, 35 Ind. App. 403; *Southern Ind. R. Co. v. Messick*, 35 Ind. App. 676. Or carried in defendant's wagon. *Bowles v. Indiana R. Co.*, 27 Ind. App. 672. Walking to work on railroad track. *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432. Riding on hand car on way home from work. *Baltimore & O. S. W. R. Co. v. Henderson*, 31 Ind. App. 441. Returning from work on railway velocipede furnished him by defendant. *Wabash R. Co. v. Erb* [Ind. App.] 73 N. E. 939. Saleswoman after work ceased was carried in master's elevator to top floor to get her wraps. *McDonald v. Simpson-Crawford Co.*, 100 N. Y. S. 269. See *Chicago Term. Trans. Co. v. Schiavone*, 216 Ill. 275, where conductor of train picked up track men to carry them to their work, they were not in the employment unless conductor had authority so to do.

p. 76, n. 159. *Virginia Bridge & I. Co. v. Jordan*, 143 Ala. 603; *O'Neil v. Pittsburgh, C. C. & St. L. R. Co.*,

130 Fed. 204; *Lentino v. Port Henry I. O. Co.*, 71 App. Div. 466, 75 N. Y. S. 755. Where plaintiff left the usual means of egress and was hurt he was at best a mere licensee. *Geis v. Tennessee, C. I. & R. Co.*, 143 Ala. 299.

And, where engineer in coming to his work did not take the usual path but went up between the tracks to a signal house for his own purposes and was run over by defendant's train while returning, it was held, under the Workmen's Compensation Act, that the accident did not arise in the course of his employment. *Benson v. Lancashire & Y. R.* [1904] 1 K. B. 242.

p. 76, n. 160. Plaintiff was boarded and lodged in tent provided by master and while sleeping there, his shift being off duty, was injured by a blast, he was held not a servant and entitled to warning. *Orman v. Salvo* [C. C. A.] 117 Fed. 233. One continues a servant during an interval in the work. *Southern Ind. R. Co. v. Harrell*, 161 Ind. 689. As an engineer while waiting to take his engine. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind 247, 78 N. E. 1033. Or brakeman waiting in caboose before train is made up. *Chicago R. Co. v. Oldridge* [Tex.] 76 S. W. 581. Where a street car conductor temporarily laid off for illness was riding free on a car and was injured by the driver's carelessness it was held that they were fellow-servants. *McLaughlin v. Interurban St. Ry. Co.*, 101 App. Div. 134, 91 N. Y. S. 883. A workman was suspended from work temporarily and in such a case it was the rule that he should go to the pit bottom whence the cage went up. He stopped, however, in a passway and was injured. It was held, under the Workmen's Compensation Act, that the accident did not arise in course of

or out of his employment. *Smith v. South Norman-ton C.-Co.*, C. A. [1903] 1 K. B. 204.

p. 76, n. 161. So where they are going out for the noon hour. *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

p. 77, n. 163. See *The Thomas Turnbull*, 99 Fed. 781. Plaintiff testified that the foreman had given him a job and told him to select his room and that he was looking for it when he was hurt. The defendant denied this and said that the plaintiff was on the premises looking for work. It was a question for the jury whether he had become an employe. *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152.

p. 77, n. 165. Workman leaving to get a drink and killed while returning is in the course of his employment under the Workmen's Compensation Act. *Keenan v. Flemington Coal Co.*, 5 F. 164, Ct. Sess. Cas. 5th Ser. Servant going out during hours because he was sick. *Southern C. C. Co. v. Swinney*, 42 So. 808. Where servants are permitted to eat lunch on the premises, one who goes to get his dinner pail after hours continues in the employment. *Taylor v. Bush & Sons Co.* [Del.] 61 A. 236.

Section 14. Proximate Cause.*

p. 78, n. 169. A claim for personal injuries is not assignable before judgment. *Flynn v. Butler*, 189 Mass. 377.

p. 79, n. 171. See, also, *Claypoole v. Wigmore*, 34 Ind. App. 35; *Lake Erie & W. R. v. Charman*, 161 Ind.

* 6 Curr. Law, 534.

95. That negligent act is nearest in point of time does not of necessity make it the efficient cause. *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 308. Or that the negligent act was the immediate or originating cause of injury. *Yess v. Chicago Brass Co.*, 124 Wis. 406.

p. 82, n. 172. See, also, *Claypoole v. Wigmore*, 34 Ind. App. 35; *Thompson v. Louisville & N. R. Co.*, 91 Ala. 496; *Laidlaw v. Sage*, 158 N. Y. 73.

p. 82, n. 173. Plaintiff's intoxication may be a condition rather than the proximate cause of his injury, as where defendant's servants helped a drunken man up a flight of steps but permitted him to fall. *Black v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 797. Violation of statute may be a condition rather than a cause. *Farrell v. B. F. Sturtevant Co.* [Mass.] 80 N. E. 469.

p. 82, n. 174. See, also, *Martin v. Connatis Co.*, 33 W. R. 216.

p. 85, n. 175. Proximate cause ordinarily for jury. *Terre Haute Elec. Co. v. Kieley*, 35 Ind. App. 180; *Davis v. Mercer Lumber Co.*, 164 Ind. 413. But is for the court when the facts are undisputed and but one inference can be drawn. *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 308. **Examples of intervening cause.** Child employed by defendant in violation of statute injured by act of another employe in throwing piece of wood at him. *Nickey v. Stender*, 164 Ind. 189. Plaintiff employed to guard mouth of mine where convicts were employed was shot by convict. Alleged negligence of defendant in failing to see that convicts had no weapons, too remote. *Thomas v. Sloss-Sheffield S. & I. Co.*, 39 So. 715. While plaintiff was working on

scaffold which he alleged was improper, he was injured by falling of a servant on him from shelf above. **Madiss v. Norcross Bros. Co.**, 98 N. Y. S. 223. While plaintiff was crossing on plank over an open space in bridge foreman ordered load swung without using a snub line and the load struck plaintiff. **American Bridge Co. v. Seeds** [C. C. A.] 144 Fed. 605. Though plaintiff violated rule of defendant by going between moving cars he may recover where engineer purposely increased speed. **Louisville & N. R. Co. v. Preston**, 40 So. 337. See, also, **Alabama G. S. R. Co. v. Bonner**, 39 So. 619. Where head light of engine was defective but master had provided hand lamps which the engineer failed to use, the proximate cause was the engineer's negligence. **New York Cent. & St. L. R. Co. v. Perigney**, 138 Ind. 414. Though defendant carelessly furnished a defective ladder, yet servants were negligent in repairing and using it. **Higgins v. Higgins**, 188 Mass. 113. Where car of defendant, not plaintiff's master, had a defective brake, and plaintiff's co-servants relying on brake failed to block the car whereby plaintiff was injured, such failure did not relieve defendant. **Hale v. New York, N. H. & H. R. Co.**, 190 Mass. 84. **Examples where defendant's negligence was not a cause:** Plaintiff run down by hand car with defective brake but his co-servants did not attempt to use brake. **Baltimore & O. S. W. R. Co. v. Henderson**, 31 Ind. App. 441. Plaintiff piling iron bars when an electric light went out and bars fell. **Grant v. National Ry. Spring Co.**, 86 App. Div. 593, 83 N. Y. S. 1021. Plaintiff knowing of unguarded cogs near by stood on piece of shafting lying on the floor which rolled and

pitched him into the cogs. *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132. Plaintiff driving a car with a balky mule. The mule balked and plaintiff getting off car slipped when getting on car again. *Richards v. Sloss-Sheffield S. & I. Co.*, 41 So. 288. Where a stool in an elevator was moved by defendant's employe so that the elevator boy in starting to sit on it fell and to save himself grasped lever of car thus starting it and injuring a passenger, it was held that moving of stool was not a proximate cause. *Gibson v. International Trust Co.*, 177 Mass. 100, 186 Mass. 454. Ladder slipped and servant in trying to save himself caused hammer to fall on plaintiff. Quaere whether defendant's alleged negligence as to fastening ladder was too remote. *Fay v. Wilmarth*, 183 Mass. 71. Servant left a hammer lying on track and defendant's foreman for whose negligence defendant was responsible failed to see and remove it. Train struck hammer and threw it against plaintiff. Foreman's negligence not too remote. *Texas & P. R. Co. v. Carlin* [C. C. A.] 111 Fed. 777.

Section 15. Concurring Negligence of Fellow-Servant.*

p. 86, n. 176. See *Murtaugh v. New York Cent. & H. R. R. Co.*, 49 Hun, 456, 3 N. Y. S. 483.

p. 88, n. 179. *Drommie v. Hogan*, 153 Mass. 29.

p. 88, n. 181. Where tracks were defective and car escaped from servant. *Union Gold Min. Co. v. Crawford*, 29 Colo. 511. Defective elevator carelessly operated. *Cudahy Packing Co. v. Anthes* [C. C. A.] 117 Fed. 118. Rotten ties and servant's negligence de-

* 6 Curr. Law, 535.

railed engine. *Shugart v. Atlanta K. & N. R.* [C. C. A.] 133 Fed. 505. No bumper at end of trestle and careless management of train. *Pennsylvania R. Co. v. Jones* [C. C. A.] 123 Fed. 753. Failure to inspect walls of mine and negligent servant. *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1. Master cannot escape responsibility for his negligence because act of servant was negligent. *American Tin Plate Co. v. Williams*, 30 Ind. App. 46. As to findings on proximate cause where there was a defective track and a negligent engineer in charge and control of engine, see *Chicago, I. & L. R. R. Co. v. Ferguson*, 27 Ind. App. 114. Barrier of iron posts had been replaced with wooden posts and one of these being knocked out was so nailed back by servant that when plaintiff fell against it, the post gave way. Defendant liable. *Garrant v. Cashman*, 183 Mass. 13. No derailing switch, and car, probably through some one's negligence, ran down siding and caused collision. *Cooper v. New York, O. & W. R. Co.*, 84 App. Div. 42, 82 N. Y. S. 98. Foreman turned on steam into a rotten tank which exploded. *Franck v. American Tartar Co.*, 91 App. Div. 571, 87 N. Y. S. 219. Where negligence of defendant permitted gas to escape defendant may be liable although a spark from servant's chisel ignited it. *Cadigan v. Glens Falls, G. & E. L. Co.*, 98 N. Y. S. 954. Brakeman caught between projecting runways on cars and servant negligent. *Strauss v. New York, N. H. & H. R. Co.*, 91 App. Div. 583, 87 N. Y. S. 67. Unsafe derrick and negligent servant. *Butler v. New England Structural Co.*, 191 Mass. 397. Unguarded machine and negligent servant. *Buehme v. Creamery P. Mfg. Co.*, 124 Iowa, 445. Defective hook and care-

less management of rope. *O'Keefe v. Great Northern El. Co.*, 105 App. Div. 8, 93 N. Y. S. 407. Unsuitable appliance and defective rope selected. *Pluckham v. American Bridge Co.*, 104 App. Div. 404, 93 N. Y. S. 748. Improper spur track and negligent servant. *Gila Valley G. & N. R. Co. v. Lyon*, 203 U. S. 465. See *Kremer v. New York Edison Co.*, 102 App. Div. 433, 92 N. Y. S. 883, where defendant was held liable because servant turned a wrong switch and it did not have a certain device which would have prevented an accident in such a contingency. Dissenting opinion.

p. 89, n. 182. This rule is not to be applied to statute permitting recovery for wrongful death. *Oulighan v. Butler*, 189 Mass. 287.

CHAPTER II.

PARTIES AND DAMAGES.

- § 16. Statutory Action for Death.**
- 17. Alabama.**
- 18. Massachusetts.**
- 19. Indiana.**
- 20. Colorado.**
- 20a. New York.**
- 21. Right of Action Ground for Administration**
- 22. Foreign Administrator.**
- 23. Conflict of Laws.**
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Section 16. Statutory Action for Death.*

p. 92, n. 4. Under New York statute recovery does not depend upon whether death was instantaneous or not. *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.

p. 92, n. 5. *Swift & Co. v. Johnson* [C. C. A.] 138 Fed. 867.

p. 93, n. 9. New York Code of Civil Proc. §§ 1902-1905. See, as to statutes of Hawaii, *The Schooner Robert Lewers Co. v. Kekanoka* [C. C. A.] 114 Fed. 849. As to the difference between Lord Campbell's Acts and the Mass. statutes, see *Hudson v. Lynn & B. R. Co.*, 185 Mass. 510.

p. 94, n. 10. The fourth line of this note should read "*Dickinson v. North Eastern R. Co.*, 2 Hurl. 735;

* 7 Curr. Law, 1083.

husband living apart from his wife cannot, *Simpson v. Wood*, etc." Under Missouri statute widow is the one to sue and fact that she was living in adultery apart from her husband is no ground for permitting her children to sue, even if proof of that fact might defeat her action. *Cole v. Mayne* [C. C. A.] 122 Fed. 836. As Idaho statute gives right of action to heirs or personal representatives, the widow cannot sue in her own name. *Vaughn v. Bunker Hill & S. M. & Co.*, 126 Fed. 895. Pennsylvania statute provided that widow should sue but action was brought by personal representative; proper to allow amendment making widow the plaintiff. *Leman v. Baltimore & O. R. Co.*, 128 Fed. 191. Nevada statute requires names of kindred to be given. *Peers v. Nevada, P. L. & W. Co.*, 119 Fed. 400. Under Illinois statute requiring action to be brought by personal representative for benefit of next of kin, it is necessary to allege their existence and that is sufficiently done by allegation "his only heirs at law, father, etc." *Chicago & E. I. R. Co. v. La Porte*, 33 Ind. App. 691. Under Canada statute the right of action given to widow and relatives is an independent and personal right and is not derived from deceased. *Miller v. Canada G. T. Ry. Co.*, P. C. 1906 A. C. 187. Items of damage under Lord Campbell's Act. *Clark v. London Gen. Omnibus Co.*, C. A. 1906 W. N. 153.

p. 94, n. 11. Father had abandoned his son when nine years old and had since contributed nothing to his support. Under Minn. statute father's damages for son's death were nominal; emancipation was implied. *Swift & Co. v. Johnson* [C. C. A.] 138 Fed. 862. Complaint alleged existence of wife and children but

failed to allege that they had sustained damages, but complaint held good since damages to wife and children will be presumed. *Peden v. American Bridge Co.*, 120 Fed. 523. Under Nevada statute not necessary to claim punitive damages and they may be recovered. *Peers v. Nevada, P. L. & W. Co.*, 119 Fed. 400. Under Minn. statutes administrator holds funds for the next of kin, and as the father is entitled to receive them they are assets of his estate and pass to his trustee in bankruptcy. In *Re Burnstine*, 131 Fed. 828.

p. 94, n. 12. *Needham v. Grand Trunk R. Co.*, 38 Vt. 294. Evidence of physical suffering under New Hampshire statute. *Hastings Lumber Co. v. Garland* [C. C. A.] 115 Fed. 15. At common law count for death and count for suffering cannot be joined. See *infra*, n. 53.

Section 17. Alabama.

p. 96, n. 15. Under this statute administrator may recover for death of his intestate caused by defendant's failure to comply with Act of Congress as to automatic couplers. *Mobile, J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 258. Under this statute defendant cannot set off damages which it has sustained through the plaintiff's carelessness. *Western Ry. of Ala. v. Russell*, 39 So. 311.

p. 97, n. 19. Validity of administrator's appointment cannot be questioned by plea. *McGhee v. Willis*, 134 Ala. 281.

p. 99, n. 27. Exemplary damages may be recovered where employe himself sues under act. *Southern R. Co. v. Bunt*, 131 Ala. 591.

p. 99, n. 28. Where parent had consented to minor son's working as driver, and son had with his consent changed to digging but without defendant's knowledge, there was no employment and no liability. *Patterson v. Neal*, 135 Ala. 477. Parent's consent to son's shoveling coal does not apply to his using a barrow about the works. *Dimmick Pipe Wks. v. Wood*, 139 Ala. 282.

p. 100, n. 29. Although punitive damages are not recoverable when the action is for the death, yet when the injured person himself sues under the act they may be recovered. *Southern R. R. Co. v. Bunt*, 131 Ala. 591.

p. 101, n. 31. If child has a father, as the father is entitled to the child's earnings during minority, the amount of the earnings cannot be considered in estimating the value of his estate. Evidence of them is, however, admissible on the question of his earning capacity. *Tutwiler Coal & I. Co. v. Enslen*, 129 Ala. 336. Evidence that deceased saved part of his earnings is admissible. *Louisville & N. R. Co. v. York*, 128 Ala. 305. Evidence of his skill, and life expectancy of his parents, is admissible. *Alabama, S. & W. Co. v. Griffin*, 42 So. 1034.

p. 101, n. 32. If in suit under act it appears that deceased spent all his earnings on others than the distributees, then they can recover only nominal damages. *Central of Georgia Ry. Co. v. Alexander*, 40 So. 424.

Section 18. Massachusetts.

p. 105, n. 42. This statute does not, however, apply to a servant of the defendant. The Massachusetts

death statutes were considered in the case of Worcester & S. St. R. Co. v. Travelers Ins. Co., 180 Mass. 263. The insurance company issued a policy to the railway insuring it "against loss from liability to every person who may . . . accidentally sustain bodily injuries . . . under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries." Several people were killed instantaneously and without conscious suffering on plaintiff's railway and the question was whether liability to pay damages for their deaths came within the terms of the policy and it was held by a divided court that it did not. The court said that there was no common-law liability for death nor did any statute giving a right of action for the death make it an asset of the estate. While a right of action for personal injuries survives, nothing in the statutes recognizes any right of survivorship in case of death, and the distinction between these rights of action has been recognized in statutes and cases. No statute giving a right to recover for personal injuries has been construed to give an action for death, nor does any statute giving a right of action for death consider as an element of damage the bodily injury to the deceased. The right of action for death is given to the personal representative and not to the deceased. The policy in suit, therefore, cannot include the case of death, for which the person never had a right of action. See, also, Smith v. Thompson-Houston Elec. Co., 188 Mass. 371. The death statutes were also reviewed, and the distinction between Lord Campbell's Act and the Massachusetts statutes pointed out in Hudson v. Lynn & B. R. Co., 185

Mass. 510. This statute R. L. c. 171, § 2, has been amended in Acts 1907, c. 375, by striking out the word "gross," increasing the limit to \$10,000, and extending the time for bringing action to two years.

p. 106, n. 45. See Acts 1906, c. 463, Pt. I, § 63; Pt. II, § 245. Acts 1907, c. 392, amends Acts 1906, c. 463, Pt. I, § 63, by striking out the word "gross," raising the limit to \$10,000, and in other respects.

p. 106, n. 46. See, *supra*, note 45.

p. 106, n. 47. *Hudson v. Lynn & B. R. Co.*, 185 Mass. 510. Massachusetts act held not to be a penal statute under the definition of the United States courts and these courts may enforce rights acquired under it. *Malloy v. American H. & L. Co.* [C. C. A.] 148 Fed. 482.

p. 106, n. 50. It must be alleged and proved that intestate left widow, children or next of kin. The failure to make such allegation may be taken by demurrer or request for a ruling and may be cured by amendment. The point is not open on argument of exceptions to a general request for the direction of a verdict. *Oulighan v. Butler*, 189 Mass. 287.

p. 107, n. 52. But counts under the statute and at common law cannot be joined in the same action. See below, n. 53.

p. 107, n. 53. A stranger was killed by a train and his administrator brought an action declaring in one count for the death under R. L. c. 171, § 2, and in another count on the common law to recover for decedent's suffering. The court refused to make plaintiff elect and he recovered \$5,000 on first and \$500 on second count. The case was reported and the court held

that the verdict could stand on only one count and plaintiff by agreement elected the first. The court saying "The first count is founded on an alleged statutory liability for causing the death of the plaintiff's intestate, which the plaintiff seeks to enforce as the representative of the next of kin, for whom he would hold the proceeds. The second count is upon the liability at common law, for injuries to the intestate, for which he had a right of action during his life, and the claim is made by the plaintiff as legal representative of the estate of the deceased, for which he would hold the proceeds. In the first the plaintiff acts only as trustee for the next of kin, in the second only as trustee for those interested in the estate. These claims do not accrue to him in the same capacity, and hence by the rules of pleading at common law, which in this respect have not been changed by our statutes, they cannot be joined in the same action." *Brennan v. Standard Oil Co.*, 187 Mass. 376. Where administrator brought action to recover for the death and conscious suffering of her intestate, a servant of defendant, and joined counts under the Employer's Liability Act with a count at common law for decedent's suffering, it was held that this joinder was improper. *Hyde v. Booth*, 188 Mass. 290. Since the decision in these cases, however, the following statute has been passed:

Mass. Acts of 1906, c. 370. Section 1. Section seventy-two of chapter one hundred and six of the Revised Laws is hereby amended by adding at the end thereof the words:—and in the same action under a separate count at common law, may recover damages for con-

scious suffering from the same injury,—so as to read as follows:—

“Section 72. If the injury described in the preceding section results in the death of the employe, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employe may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury: and in the same action under a separate count at common law, may recover damages for conscious suffering resulting from the same injury.

Section 2. This act shall take effect upon its passage. (Approved May 8, 1906.’’)

The evident purpose of this amendment is to do away with the objection raised in the cases above cited and so far to change the rules of common-law pleading as to permit an administrator to join a count under the Employer’s Liability Act for conscious suffering and death, with a count at common law for the suffering.

In such an action some question might be raised as to damages. The limit of damages for suffering at common law is the *ad damnum* of the writ, but the limit of damages for suffering under the Act is fixed by the terms of the Act to \$4,000 if there are no persons who could recover for the death, or, if there are such persons, then to \$5,000 for both suffering and death to be apportioned by the jury. The damages for suffering,

however, arise out of the same injury whether the verdict goes on the count under the Act or on the common law count and a plaintiff would not be permitted to hold both verdicts. It would seem to be proper to require the plaintiff to elect before the case is submitted to the jury upon which count he will stand.

p. 111, n. 58. When death is not instantaneous or is preceded by conscious suffering, the proper person to sue is the administrator and not the widow or dependent next of kin. "By the employer's liability act as originally passed where 'an employe is instantly killed or dies without conscious suffering' his widow or next of kin if dependent upon him for support at the time of his death is given a right of action against his employer for damages. No provision, however, was made for such recovery if death was not instantaneous, or without regaining consciousness. This statutory right was subsequently enlarged by the St. of 1892, c. 260, now R. L. c. 106, § 72, to include a case where the decedent before death consciously suffered. But the form of remedy was limited to his personal representatives. While they were entitled to recover damages for the injuries received, which upon recovery would become assets of his estate and might or might not finally be shared by the widow or dependent next of kin, they were also within the same action allowed to recover damages for his death. By this double procedure the maximum amount recoverable is limited. Whatever sum is awarded must be apportioned by the jury, which gives to an administrator the damages assessed for personal injuries to his intestate, and to the widow, or to those entitled if

the deceased leaves no widow, damages for death assessed according to the degree of culpability of the employer. R. L. c. 106, § 74. The difference between this remedy and that given where death is instantaneous, or follows without recovering consciousness, grows out of different statutory conditions. Under one form of death no cause of action is given to the personal representatives, while in the other, independently of § 74, they can recover for the personal injuries suffered by their decedent. It is the object of this section in requiring a joinder to prevent a multiplicity of suits, and to keep the entire damages recoverable within the imposed restriction. No provision is made for separate actions, and being a purely statutory remedy it must be strictly followed." *Smith v. Thompson-Houston Elec. Co.*, 188 Mass. 371. As to joining a common-law count for suffering, see *supra*, n. 53.

p. 111, n. 60. Dependent next of kin and not personal representative is the proper party to sue when servant is instantaneously killed. But if the point is taken on trial the court may allow an amendment since the mistake in naming the administrator as plaintiff does not go to the ground of the action. *Silva v. New England Brick Co.*, 185 Mass. 151. See, also, *supra*, n. 58.

p. 116, n. 73. *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

p. 116, n. 74. *Welch v. New York, N. H. & H. R. R. Co.*, 176 Mass. 393, 182 Mass. 84; *Mehan v. Lowell Elec. L. Corp.* [Mass.] 78 N. E. 385. See similar rulings upon the word "dependent" in *Workmen's Compensation Act*. *Sneddon v. Addie*, 6 F. 992. Ct. of Sess. Cas.

5th Ser. (deserting husband). *Turners v. Whitefield*, 6 F. 822. Ct. of Sess. Cas. 5th Ser. (woman living apart from husband). *Moyes v. Dixon*, 7 F. 386. Ct. of Sess. Cas. 6th Ser. *Legget v. Burke* [1902] Ct. of Sess. Cas. [1903] W. N. 163; *Pryce v. Penrikyber Nav. Coll. Co.*, [1902] 1 K. B. 221; *Rees v. Penrikyber Nav. Coll. Co.*, A. C. [1903] 1 K. B. 259; *Coulthard v. Consett Iron Co.*, A. C. [1905] 2 K. B. 869.

p. 117, n. 77. Court may in its discretion order examination. *City of South Bend v. Turner*, 156 Ind. 418, cites cases.

Section 19. Indiana.

p. 118, n. 79. Death statute is a new cause of action. The action by an administrator for pain and suffering abates by death unless saved by statute. *Hilliker v. Citizens St. Ry. Co.*, 152 Ind. 86.

p. 118, n. 81. The general administrator is the proper person to sue. *Lake Erie & W. R. v. Charman*, 161 Ind. 95; *Diller v. Cleveland, C. C. & St. L. R. Co.*, 34 Ind. App. 52. Administrator's right to sue is properly raised by demurrer for want of facts. *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546. Where there were no children and widow died during pendency of action and the next of kin were not dependent, the action abates. The death of the beneficiary abates action under this statute. *Diller v. Cleveland, C. C. & St. L. R. Co.*, 34 Ind. App. 52. In distribution of damages, children of former marriage may share though their names are omitted from complaint; an emancipated son supported by a stranger may share; and a daughter living away from home and receiving irregu-

lar support from father may share. There must be persons who have suffered loss to give a right of action and the damages are not part of decedent's estate. *Duzan v. Myers*, 30 Ind. App. 227.

p. 118, n. 81. *Burns' Rev. St. 1901*, § 285, is a new right of action not for or against decedent's estate. *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95. This statute is a new right of action and not a continuation of one pending at injured person's death. *Diller v. Cleveland, C. C. & St. L. R. Co.*, 34 Ind. App. 52.

p. 119, n. 84. Right of mother to sue is an issuable fact to be averred and proved. *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 355.

p. 120, n. 89. Measure of damages is the pecuniary loss suffered by the beneficiaries. *Consolidated Stone Co. v. Staggs*, 164 Ind. 331. Need not allege pecuniary interest of widow or next of kin. *Pennsylvania Co. v. Coyer*, 163 Ind. 631.

p. 121, n. 90. Marriage of widow is not to be considered by jury in assessing damages. *Consolidated Stone Co. v. Morgan*, 160 Ind. 241.

p. 121, n. 91. No presumption of pecuniary loss in case of brothers and sisters or nephews and nieces. *Cleveland, C. C. & St. L. R. Co. v. Drumm*, 32 Ind. App. 547.

p. 122, n. 93. *Southern Ind. Ry. Co. v. Moore*, 34 Ind. App. 154; *Cleveland, C. C. & St. L. R. Co. v. Miles*, 162 Ind. 646.

Section 20. Colorado.

p. 127, n. 105. *Ristine, Rec. v. Blocker*, 15 Colo. App. 224.

Section 20a. New York.

The Employers' Liability Act, Laws 1902, c. 600, § 1, cl. 2, provides: "The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employe suing under the provisions of this act.

"§ 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two of this act be a bar to the maintenance of any such existing right of action."

The provisions of law relating to actions for causing death are found in the Code of Civil Procedure, §§ 1902-1905. The person to bring the action under these provisions and under the Employers' Liability Act is the executor or administrator of the deceased, but the Code provides that the "action must be commenced within two years after the decedent's death" while the Employers' Liability Act provides: "No action for the recovery of compensation for injury or death under this act shall be maintained unless . . . the action is commenced within one year after the occurrence of the accident causing the injury or death." The provisions of the death statute are therefore inconsistent with the act in regard to the time within which action must be brought and also with reference to the time when this period begins to run; in the one case the time of death and in the other the time of the

occurrence of the accident which caused the death marks the date from which the period must be reckoned. As to this matter the act governs and consequently when an administrator seeks to recover for the death of his intestate upon a cause of action good only by virtue of the Liability Act he must begin his action within one year from the occurrence of the accident. The Employers' Liability Act is a cumulative remedy with the death statute. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. S. 657; *Mulligan v. Erie R. Co.*, 99 App. Div. 499, 91 N. Y. S. 60.

Section 21. Right of Action Ground for Administration.*

p. 128, n. 106. *Toledo R. Co. v. Reeves*, 8 Ind. App. 667, in which it is said that under death statute the administrator is trustee for the beneficiaries and in so far does not represent the estate. Recovery for death of nonresident having no property in this state may be had by his administrator in courts of this state. *Alabama S. & W. Co. v. Griffin*, 42 So. 1034.

p. 128, n. 107. Validity of administrator's appointment cannot be attacked collaterally. *Breeding v. Breeding*, 128 Ala. 412; *McGhee v. Willis*, 134 Ala. 281; *Reiter-Conley Mfg. Co. v. Hamlin*, 40 So. 280.

Section 22. Foreign Administration.*

p. 129, n. 108. Under the Ohio statute an administrator appointed in Indiana may sue in Ohio. *Cincin-*

* 7 Curr. Law, 1085.

nati H. & D. R. Co. v. Thiebaud [C. C. A.] 114 Fed. 918.

p. 129, n. 109. Where the defendant and the beneficiaries were citizens of Ohio and the administrator was appointed in Indiana, his citizenship is sufficient to permit him to sue in U. S. court. Cincinnati H. & D. R. Co. v. Thiebaud [C. C. A.] 114 Fed. 918. Administrator qualified in one state cannot sue in another without latter's permission. Brooks v. Southern Pac. R. Co., 148 Fed. 986.

Section 23. Conflict of Laws.*

p. 131, n. 112. Vaughn v. Bunker Hill, & S. M. & C. Co., 126 Fed. 895; Fabel v. Cleveland, C. C. & St. L. R. Co., 30 Ind. App. 268. Where suit was brought by administrator in Illinois based upon Penn. statute which provided that the widow should sue, an amendment could substitute widow's name and this was not a new cause of action. Leman v. Baltimore & O. R. Co., 128 Fed. 191. Where under Wyoming statute administrator holds funds for the beneficiaries instead of the estate, an administrator appointed in Colorado cannot sue on that statute in Colorado since the proceeds must be distributed according to Wyoming law. Sanbo v. Union Pac. Coal Co., 130 Fed. 52. The distribution is to be made to those entitled under statute of place where accident occurred and not under laws of forum. Denver & R. G. R. Co. v. Warring, 86 P. 305. Either state or federal courts would distribute assets in accordance with the foreign law. Leman v. Baltimore & O. R. Co., 128 Fed. 191. Where a citizen of Vermont

* 7 Curr. Law, 1090.

was killed in New Hampshire and the New Hampshire statute permitting survival did not provide what personal representative should sue it was held that a Vermont administrator was the proper party since the right of action was possessed in the intestate's domicile. *Stockwell v. Boston & M. R. R. Co.*, 131 Fed. 152.

p. 132, n. 113. The representative may sue for less than the statutory limit. *Baltimore & O. R. Co., v. Ryan*, 31 Ind. App. 597.

p. 133, n. 117. *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553.

p. 133, n. 118. Benefit of Ohio death statute may be claimed by alien next of kin. *Pittsburgh, C. C. & St. L. R. Co. v. Naylor* [Ohio] 76 N. E. 505; *Baltimore & O. R. Co. v. Baldwin* [C. C. A.] 144 Fed. 53. So under New York death statute. *Alfson v. Bush Co.*, 75 N. E. 230. And under Iowa statute. *Romano v. Capital City B. & P. Co.*, 101 N. W. 437. See also, *Alabama S. & W. Co. v. Griffin*, 42 So. 1034. Contra, *McMillan v. Spider Lake Co.* [Wis.] 91 N. W. 979. In *Cleveland, C. C. & St. L. R. Co. v. Osgood* [Ind. App.] 73 N. E. 285 (s. c. Ind. App. 70 N. E. 839), it was held that nonresident aliens might have benefit of the Indiana death statute, *Burns'* 1901, § 285, in cases where the laws of their domicile would permit a similar recovery, on the ground of reciprocity.

Section 24. Releases.*

p. 134, n. 119. Person believed that paper he signed was a release but did not read it. *Schenfeld v. Hoch-*

* 6 Curr. Law, 1286.

man, 100 N. Y. S. 1020. Jury found that plaintiff was prevented from reading release because "somewhat hurried." This is not a sufficient excuse. *Atchison, T. & S. F. R. Co. v. Vanordstrand* [Kan.] 73 P. 113. Plaintiff who signs without reading release is bound unless such artifice and fraud have been practiced upon him as would excuse him from reading. *Osborne v. Missouri Pacific R. Co.* [Neb.] 98 N. W. 685. Failure of Pullman porter to read contract signed by him when he entered service by which he assumed risk of injury is no ground of avoidance in absence of fraud or misrepresentation. *New York Cent. & H. R. R. Co. v. Difendaffer* [C. C. A.] 125 Fed. 893. Plaintiff could read but signed release without reading it; cannot recover. *Heck v. Missouri Pac. R. Co.* [C. C. A.] 147 Fed. 775. Where plaintiff could read and had full opportunity to do so, and there was much haggling as to amount, and she was nervous, but nothing appearing to show threats or compulsion, a release signed by her is valid. *Blair v. Utica & M. V. R. Co.*, 98 N. Y. S. 614. Claim that oral agreement to release was incorrectly reduced to writing by defendant and signed by plaintiff without reading it is not a reason for setting it aside where it does not appear that it was incorrectly read or that plaintiff was prevented from reading, that there was any excuse for not reading or that plaintiff was mentally incompetent. *Hoerger v. Citizens St. R. Co.* [Ind. App.] 76 N. E. 328. Before defendant would re-employ plaintiff he was obliged to sign a release in consideration of one dollar and one day's employment; afterward injury became more serious. Valid release. *Quebe v. Gulf, C. & S. F. R. Co.*

[Tex.] 81 S. W. 20. Plaintiff claimed that he was induced to sign release by its being misread to him in such a way as to cause him to understand that it was only a receipt to an insurance company for hospital expenses and not for his injuries generally. It was correct to instruct that if such misreading was done to deceive the plaintiff he is not bound, and that he is not estopped by the fact that he had opportunity to read and did not. *New Omaha, T.-H. El. L. Co. v. Rombold* [Neb.] 93 N. W. 966. Where plaintiff could not read and the release was not fully read to him and its contents were misstated, there was evidence of fraud for the jury. *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254. Father who could not read English signed release for death of his son believing that it was for funeral expenses, etc.; question for jury whether he understood the effect of his act. *Erickson v. Northwest Paper Co.* [Minn.] 104 N. W. 291.

p. 134, n. 121. Release may be avoided for fraud, but evidence of fraud must be clear. *Western R. of Ala. v. Arnett*, 137 Ala. 414. Fraud cannot exist without an intention to deceive. *Pawnee Coal Co. v. Royce*, 184 Ill. 402. "There was an utter absence of that good faith and full understanding of legal rights which are indispensable to the validity of such releases. No release of this nature should be upheld if any element of fraud, deceit, oppression or unconscionable advantage is connected with the transaction." *Kansas City M. & B. R. Co. v. Chiles* [Miss.] 38 So. 498. On the question of fraud in obtaining the release, a conversation with the claim agent after

signing it is admissible. *Keefe v. Norfolk Sub. St. R. Co.*, 185 Mass. 247. Defendant's physician attended plaintiff and jury might have found that he knew that the plaintiff's injuries were more serious than he represented them and that plaintiff acted upon his assurances. *Viallet v. Consolidated R. & P. Co. [Utah]* 84 P. 496. Where defendant's physician and its claim agent together represented that the injuries were slight and induced plaintiff to sign release it may be set aside. *International & G. N. R. Co. v. Shuford [Tex. Civ. App.]* 81 S. W. 1189. But the representations of defendant's physician will not bind defendant when he was not employed to make the settlement, or when he had no authority to make the representations or when it does not appear that these representations were known to the defendant or its agent who made the settlement. *Gulf C. & S. F. R. Co. v. Hugett [Tex.]* 92 S. W. 454. Claim agent told plaintiff that her physician had told him she would be well in a day or two. She sent for physician but agent saying he was in a hurry and was telling the truth obtained release before the physician came. Held evidence of fraud. *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. 110, 88 N. Y. S. 732. Plaintiff testified that at time of giving the release he had headaches and delusions, thought he was in a grave and that he could only get out by signing. Question of his capacity for jury. *Butler v. New England Structural Co.*, 191 Mass. 397. Where plaintiff testified that when she signed release she suffered from shock and was under the influence of opiates and did not understand and that it was not fairly read to her, there is evidence for the jury. *Chicago Union Trac.*

Co. v. Ludlow, 108 Ill. App. 357. Fraud or trickery which relates to the obtaining of the execution of a release avoids it and may be availed of at law, but fraud or misrepresentation as to the nature or extent of the consideration given can only be taken advantage of in equity. Pabke v. G. H. Hammond Co., 192 Ill. 631; Hartley v. Chicago & A. R. Co., 214 Ill. 78; Chicago Union Trac. Co. v. Mommsen, 107 Ill. App. 353. Under Massachusetts practice plaintiff may show that a release specially pleaded by defendant was obtained by fraud, without filing a replication. Lyon v. Manning, 133 Mass. 439. Where answer set up a release, a reply that it was not made is sufficient against demurrer. Indiana Union Trac. Co. v. McKinney [Ind. App.] 78 N. E. 303. Plaintiff by going back to work and receiving a month's pay for two week's work is not estopped to set up fraud in obtaining the release, not having discovered the fraud until after he had returned to work. Coles v. Union Term. R. Co. [Iowa] 99 N. W. 108.

p. 135, n. 122. Recital as to consideration stated in release may be contradicted by parol evidence. Citizens St. R. Co. v. Heath, 29 Ind. App. 395. Had there been an absolute promise to employ in the terms of the release "for such time only as may be satisfactory to said company" it would have been too uncertain to be enforceable because the time of employment would have been wholly optional with defendant and, therefore, would not have afforded a consideration for the release. Not the same as a promise to employ where no time is fixed. The actual employment "for some time" did not supply the consideration. Missouri K.

& T. R. Co. v. Smith [Tex.] 81 S. W. 22; Gulf C. & S. F. R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477. See *Forbs v. St. Louis I. M. & S. R. Co.*, 107 Mo. App. 661, where such a promise was held a good consideration. Where it was the custom of defendant to continue the wages of disabled employes, evidence might be offered of this custom and that the amount stated as consideration was not in fact consideration but was due employe anyway by virtue of the custom. *Hot Springs R. Co. v. McMillan* [Ark.] 88 S. W. 846.

p. 135, n. 123. A promise to employ servant for life at certain wages in consideration of a release is not unreasonable or unusual. Even if contract was beyond the scope of agent's authority or was ultra vires, the defendant is estopped to assert that defense since defendant took a release and plaintiff's claim is also barred by statute of limitations and plaintiff has performed his part of the contract. Dissenting opinion. *Usher v. New York Cent. & H. R. R. Co.*, 76 App. Div. 422, 78 N. Y. S. 508; *Id.*, 179 N. Y. 544. See *Jarmusch v. Otis I. & S. Co.*, 3 Ohio Cir. Ct. R. [N. S.] 1, where there was a novation. Contract to give employment as consideration of release is not void under Ohio statute. *Bowers v. Detroit So. R. Co.*, 4 Ohio Cir. Ct. R. [N. S.] 479.

p. 135, n. 125. Defendant's doctor told plaintiff he would be able to work in a short time and plaintiff signed a release in consideration of his wages and medical expenses. It turned out that his injuries were very serious. Held release was executed by mutual mistake and could be vacated. *Great Northern R. Co. v. Fowler* [C. C. A.] 136 Fed. 118. Reformation of re-

lease in equity. *Chicago & A. R. Co. v. Green*, 114 Fed. 676. Where a written release set forth an agreement and after signing it a different agreement was made orally and then the written release was delivered it was held that the terms of the written release and not the oral agreement governed even though the latter had been acted upon for eight years. *Boggs v. Pacific Steam Laundry Co.*, 171 Mo. 282.

p. 135, n. 126. A general release and "especially on account of a certain accident which occurred on or about the 18th day of July, 1903," is a bar to an action for injuries received in an accident on March 8, 1902. *Chicago Union Trac. Co. v. O'Connell* [Ill.] 79 N. E. 622. Release recited date and place of accident and certain bruises and wounds received and then released all claims for "the injuries and damages sustained by me in the manner or upon the occasion aforesaid and arising or accruing or hereafter arising or accruing in any way therefrom." Plaintiff claiming impaired mental powers and bad eye sought damages for these and was allowed to recover on the ground that the release covered only the injuries specified in it. *Texas & P. R. Co. v. Dashiell*, 198 U. S. 521. Plaintiff being injured in throat and breast gave release and went back to work. After a few months he became blind. Held that release covered claim for blindness. *Quebe v. Gulf, C. & S. F. R. Co.* [Tex.] 81 S. W. 20. General releases in stock jobbing transaction. "The releases are absolute and unequivocal in their terms, and must be construed according to the language which the parties have seen fit to use. In order to operate as a release of all demands in suit it was not necessary that the parties should have

had them in their minds at the time of the execution of the releases if they are embraced by the terms that were used." *Klopot v. Metropolitan Stock Exch. Co.*, 188 Mass. 335.

p. 135, n. 127. In order to bar recovery against a joint tortfeasor "the party to whom a release is given must be one against whom an action could or might lie and a claim had been made for or on account of the alleged tort. It is not necessary that it should appear that he was in fact liable or that there should have been concert of action amongst the alleged joint tortfeasors. . . . There must be something in the nature of a claim on the one hand and of possible liability under the rules of law applicable to the matter on the other in order to render the release a bar to recovery against other joint tortfeasors." Servant injured by third party had no cause of action against his master and so release given master does not bar his action against negligent party. *Pickwick v. McCauliffe* [Mass.] 78 N. E. 730; *Chapman v. Pittsburgh Rys. Co.*, 140 Fed. 784; *Id.* [C. C. A.] 145 Fed. 886 (wire stretched across track by third party, release to master no bar). Where the negligent conduct of several acting in concert but not by preconcert, at same time and place combined to cause injury, all are liable. *Chicago & W. I. R. Co. v. Marshall* [Ind. App.] 75 N. E. 973.

p. 136, n. 128. Where plaintiff understood he was being paid his hospital expenses only, he need not return the consideration but it will be credited upon the damages. *New Omaha, T.-H. El. L. Co. v. Rombold* [Neb.] 93 N. W. 966.

p. 138, n. 130. Where plaintiff says that no consid-

eration was given for release, defendant cannot object to plaintiff's maintenance of action without first rescinding and returning consideration. *Vindicator Consol. Gold M. Co. v. Firstbrook* [Colo.] 86 P. 313. Servant cannot attack release on ground of fraud without returning or offering to return the consideration. *Harrison v. Alabama Midland R. Co.*, 40 So. 394; *Price v. Connors* [C. C. A.] 146 Fed. 503; *Heck v. Missouri Pac. R. Co.* [C. C. A.] 146 Fed. 775; contra, *Indiana D. & W. R. Co. v. Fowler*, 201 Ill. 152. May tender consideration paid, in the pleading, without bringing it into court. *International & G. N. R. Co. v. Shuford* [Tex. Civ. App.] 81 S. W. 1189. Where release is impeached for duress, plaintiff must return the consideration. *Cammarata v. Pennsylvania Coal Co.*, 86 N. Y. S. 787; *Lewis v. Gamage*, 1 Pick. [Mass.] 346 (authority of attorney). "Whether an attorney at law has authority by virtue of his employment as such to agree without his client's sanction to a compromise of his client's suit out of court may be regarded as still an open question in this commonwealth though it is said that the weight of authority in this country seems to be against such an authority." *Anglo-American Land M. & A. Co. v. Dyer*, 181 Mass. 593, 598. Effect of entry of "agreement for judgment and judgment satisfied." *Preston v. Henshaw*, 192 Mass. 34.

p. 140, n. 136. Settlement by deceased in his lifetime bars widow. *Brown v. R. Co.* [Tenn.] 47 S. W. 415. See, also, *Southern Bell T. & T. Co. v. Cassin*, 111 Ga. 575.

p. 141, n. 139. See, also, §§ 18, 25.

p. 141, n. 142. Under New York death statute widow

may release action before she is appointed administratrix although the personal representative is the one to sue. *Mella v. Northern S. S. Co.*, 127 Fed. 416. Administratrix may compromise claim without order of court. *Pittsburgh, C. C. & St. L. R. Co. v. Gippe*, 160 Ind. 360.

Section 25. Contracts Waiving Act.*

p. 143, n. 145. As to Massachusetts cases here cited see below.

p. 143, n. 146. A free pass given to passenger which stipulates that railroad shall not be liable for negligence is valid. *Northern Pac. R. R. Co. v. Adams*, 192 U. S. 440; *Duncan v. Maine Cent. R. Co.*, 113 Fed. 508. And it is valid even if the knowledge of this stipulation is not brought home to the user. *Boering v. Chesapeake, B. R. Co.*, 193 U. S. 442; *Quimby v. Boston & M. R. Co.*, 150 Mass. 265. See, also, *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356. Where an express messenger in violation of defendant's rules wished to ride on his season ticket in the baggage car and agreed, if allowed so to ride to assume all risk of injury, it was held that the agreement was valid and included injuries to which riding in baggage car did not contribute. *Hosmer v. Old Colony R. Co.*, 156 Mass. 506; *Bates v. Old Colony R. Co.*, 147 Mass. 255. But contra as to a man who sold articles on train and was allowed to ride on season ticket which relieved railroad from liability, in a case where indictment was brought for his death. *Comm. v. Vermont & M. R. Co.*, 108 Mass. 7.

* 6 Curr. Law, 536.

A contract between porter of car and Pullman company to assume the risk of negligence of common carriers is valid. *Russell v. Pittsburgh, C. C. & St. L. R. Co.*, 157 Ind. 305. Contracts between express messenger and express company and between express company and defendant whereby plaintiff waived any claim of liability against his master and the company agreed to indemnify defendant against loss are both valid. *Baltimore & O. R. Co. v. Voight*, 176 U. S. 498. Porter on obtaining employment released Pullman company from liability for injury to him and agreed to indemnify it against liability to any transporting railroad. Valid. *McDermon v. Southern Pac. R. Co.*, 122 Fed. 669. Contra, *Mexican Nat. R. Co. v. Jackson* [C. C. A.] 118 Fed. 549. Failure to read such a contract is no ground for avoidance. *New York Cent. & H. R. R. Co. v. Diffendaffer* [C. C. A.] 125 Fed. 893. But for such a contract to bind him he must know its provisions. *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59. Construction of contract of indemnity. *Woodbury v. Post*, 158 Mass. 140. Contract of indemnity between contractor and subcontractor does not affect plaintiff, servant of latter, as he was not a party to it. *Wagner v. Boston El. R. Co.*, 188 Mass. 437.

p. 146, n. 149. *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196. A contract made by employe of express company relieving it from liability from its own negligence "or otherwise" covers liability of railroad doing business with company, and plaintiff cannot recover against such railroad. But see *Cook v. Western & A. R. Co.*, 72 Ga. 48; *Runt v. Herring*, 2 Misc. [N. Y.] 102. The question was first squarely

presented in New York in the case of *Johnson v. Fargo*, 184 N. Y. 379, which after reviewing the authorities decides that such contracts are invalid. Contract between employer and employed to absolve former from negligence, held void. *Roesner v. Hermann*, 8 Fed. 782. Before intestate was employed his next of kin made a contract releasing employer from liability for intestate's injury or death. Held invalid. *Tarbell v. Rutland R. Co.* [Vt.] 51 A. 6. Contract to waive benefit of Kansas Railroad statute is invalid. *Kansas P. R. Co. v. Peavey*, 29 Kan. 169.

p. 147, n. 151. *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413; *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109; *Id.*, 196 Ill. 594.

p. 148, n. 152. Such a rule does not require such a critical examination as the defendant is bound to make. *Baltimore & O. R. Co. v. Burris* [C. C. A.] 111 Fed. 882; *Martin v. Wabash R. Co.* [C. C. A.] 142 Fed. 650.

p. 148, n. 153. See, also, *McLeod v. New York, N. H. & H. R. Co.*, 191 Mass. 389.

p. 149, n. 154. See New York Laws 1906, c. 657, in Appendix. The Indiana statute, Burns' 1901, § 7082a, only applies to contracts made since its enactment. *Russell v. Pittsburgh, C. C. & St. L. R. Co.*, 157 Ind. 305. As to statutes, see *Chicago & N. W. R. Co. v. O'Brien* [C. C. A.] 132 Fed. 593 (Iowa statute); *Wagner v. Boston El. R. Co.*, 188 Mass. 437. See Ala. Code 1907.

p. 151, n. 155. The Indiana statute is constitutional. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1. The North Carolina statute is valid. *Coley v. North Car. R. Co.*, 128 N. C. 534, 129 N. C. 407.

Section 26. Relief Fund Agreements.*

p. 152, n. 156. *Hamilton v. St. Louis, K. & N. W. R. Co.*, 118 Fed. 92; *Pittsburgh, C. C. & St. L. R. Co. v. Gippe*, 160 Ind. 360 (acceptance by widow of benefits); *Pelty v. Brunswick & W. R. Co.*, 109 Ga. 666; *Beck v. Pennsylvania Co.*, 63 N. J. Law, 232. Relief fund agreement is valid and is not invalidated by existence of Employer's Liability Act. Establishing such a fund is not ultra vires the corporation. *Harrison v. Alabama Midland R. Co.*, 40 So. 394. Relief fund agreements are valid, but if defendant does not keep to its agreement the plaintiff, though he has accepted benefit, may sue. Here the plaintiff accepted the benefit and went back to work but his wound broke out again and being refused further benefits he sued and could maintain his action. *Pennsylvania Co. v. Chapman* [Ill.] 77 N. E. 248. Where deceased as a condition of his employment became a member of an insurance and provident society, which required in consideration of respondent's subscription that he should have no claim for injury or death by accident, and it appeared that respondents only contributed to the sick benefit part of the plan and that payment for death was a mutual insurance arrangement and payment would have been made had employe died a natural death, it was held that his widow could maintain an action for damages for his death as the insurance money did not come from respondents and had no relation to the offense. *Miller v. Canada, G. T. Ry. Co.*, P. C. 1906 A. C. 187.

p. 153, n. 159. See, also, *New York Laws 1902, c. 600, cl. 4*; *Federal Act, sec. 3*; *Ala. Code 1907, sec. 3913*.

* 2 Curr. Law, 810.

CHAPTER III.

NOTICE AND LIMITATION OF ACTION.

- § 27. Notice.
- 28. "Time, Place and Cause."
- 29. Inaccuracy.
- 30. Time for Giving Notice.
- 31. Person to Give Notice.
- 32. To Whom and How Notice Is to Be Given.
- 33. Effect of Notice.
- 34. Limitation of Action.
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Section 27. Notice.*

p. 154, n. 1. New York Laws 1902, c. 600, § 2 (See Appendix p. 703). See Safety Appliance Statute, Wash. Sess. Laws, 1905, c. 84, § 9. See Highway notice, Indiana Laws 1907, c. 153; Colo. Sess. Laws 1903, c. 175.

p. 157, n. 3. Colo. Sess. Laws 1901, c. 67 (See Appendix p. 678), has been held not to repeal the provision of the Employer's Liability Act, Laws 1893, c. 77, requiring employe to give notice of injury. *Lange v. Union Pac. R. Co.* [C. C. A.] 126 Fed. 338.

p. 157, n. 5. Failure to give notice waives count under act. *Cahill v. New Eng. Tel. & T. Co.* [Mass.] 79 N. E. 821. The giving of the statutory notice before beginning suit is a condition precedent to right

* 6 Curr. Law, 587.

to maintain an action under the New York Employer's Liability Act. *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Harris v. Baltimore, M. & E. Wks.*, 188 N. Y. 141; *Rosin v. Ledgerwood Mfg. Co.*, 88 App. Div. 245, 86 N. Y. S. 49; *Grasso v. Holbrook, C. & D. Const. Co.*, 102 App. Div. 49, 92 N. Y. S. 101; *Schermerhorn v. Glens Falls P. C. Co.*, 94 App. Div. 600, 88 N. Y. S. 407; *Severson v. Hill-Warner-Fitch Co.*, 101 N. Y. S. 808. Such a notice is not required in an action based on the labor law. *Williams v. Roblin*, 94 App. Div. 177, 87 N. Y. S. 1006. Or when action is based on Code Civ. Proc. § 1902, to recover for wrongful death. *Holm v. Empire Hardware Co.*, 102 App. Div. 505, 92 N. Y. S. 914. Or when the action is based on liability at common law. *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337; *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Schermerhorn v. Glens Falls P. C. Co.*, 94 App. Div. 600, 88 N. Y. S. 407. Cases to the contrary are not law. *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. S. 203; *Stahl v. Schoonmacher*, 84 N. Y. S. 239; *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. S. 705; *Id.*, 40 Misc. 267, 81 N. Y. S. 930; *Id.*, 83 App. Div. 339, 82 N. Y. S. 366; *Id.*, 87 App. Div. 631, 84 N. Y. S. 1127. See *supra*, § 2, n. 30. The requirement of notice in the Colorado act applies only to causes of action created by the act and no notice is required when the cause of action is at common law. *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247.

p. 158, n. 9. The New York act requires notice to be in writing. *Hunt v. Dexter Co.*, 100 App. Div. 119.

p. 160, n. 12. A notice making claim under the Workmen's Compensation Act and giving plaintiff's

name and address and stating the nature of the accident is not a notice under the Employer's Liability Act. *Thomson v. Baird & Co.*, 6 F. 142. Ct. of Sess. Cas. 5th Ser. Notice is to be reasonably construed, see *Sheehy v. City of New York*, 160 N. Y. 139. Service of summons and complaint in common-law action is not a good notice under statute. *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622.

p. 160, n. 13. Mass. Acts 1894, c. 389 (Rev. Laws c. 51, § 22; (see *supra*, note 2), does not require the notice under the Employer's Liability Act to claim damages in terms if it appears from the notice that it is intended as the basis of a claim against the person to whom it is directed. *Carroll v. New York, N. H. & H. R. Co.*, 182 Mass. 237; *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622. See *Reed v. City of New York*, 97 N. Y. 621.

Section 28. "Time, Place and Cause."*

p. 161. The New York Act has the same phraseology as the Massachusetts and Colorado statutes.

p. 162, n. 20. *Tobin v. Inhabitants of Brimfield*, 182 Mass. 117.

p. 162, n. 23. Highway notice. *Beyer v. City of Tonawanda* [N. Y.] 76 N. E. 214.

p. 163, n. 25. Cause of injury stated as out-of-plumb condition of stamping press of which there was no evidence is bad. *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. S. 307.

* 6 Curr. Law, 587.

Section 29. Inaccuracy.*

p. 164. The New York Act (see Appendix) contains substantially the same provision as here quoted from the Massachusetts act.

p. 166, n. 33. Whether inaccuracy or omission, see *Tobin v. Inhabitants of Brimfield*, 182 Mass. 117.

p. 168, n. 36. Notice stated that it was given in behalf of "John Hughes" instead of "Michael J. Hughes" and stated the cause as the out-of-plumb condition of a stamping press of which there was no evidence. Held notice insufficient in absence of proof under the statute that "there was no intention to mislead and defendant was not in fact misled thereby." *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. S. 307.

p. 169, n. 42. The effect of the Massachusetts statutes relating to notice is clearly set forth in *Tobin v. Inhabitants of Brimfield*, 182 Mass. 117. This was a highway case where the defendant objected to the statement of the place which was "at a point on said road on the Fiskdale side of the five bridges so-called." The plaintiff asked the trial court to rule that the defendant could not avail itself of any omission to state in the written notice given to the defendant, the place of the injury, because there was no evidence that the defendant complied with the provisions of St. 1894, c. 389, requiring a counter notice. The judge refused so to rule, the plaintiff alleged exceptions, and the court overruled the exceptions holding that the defect in the notice was an inaccuracy, not an omission. As it was an inaccuracy no counter notice as provided in St.

* 6 Curr. Law, 587.

1894, c. 389 (R. L. c. 51, § 22) was required. "In view of the re-enactment a few days after this statute (St. 1894, c. 389) of the provision in the Public Statutes that a notice shall not be invalid by reason of any inaccuracy in stating the time, place or cause, provided there was no intention to mislead and the defendant was not misled (St. 1894, c. 422) and in view also of the distinction between inaccuracy and omission taken shortly before in *Gardner v. Weymouth*, 155 Mass. 595, 597, we think it must be assumed that the statutes intend an antithesis. See, also, R. L. c. 51, §§ 20, 22. If there is an omission to state the place there must be a counter notification. If there is an inaccuracy in stating it there need not be, but the notice will not be invalidated except upon the further conditions just mentioned. In this view an omission must be something more than a failure to state the precise spot of the accident with sufficient clearness. The failure must be an omission patent on the face of the document." In this case the selectmen testified that they were misled. Objection that notice was misleading and plaintiff intended to mislead cannot be raised for first time in supreme court under a general ruling on evidence. *McCarthy v. Inhabitants of Dedham*, 188 Mass. 204.

p. 170, n. 43. See *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. S. 307, name of plaintiff wrong.

Section 30. Time for Giving Notice.*

p. 171, n. 48. Under the New York Act notice must be given to the employer within "one hundred and

* 6 Curr. Law, 587.

twenty days . . . after the occurrence of the accident causing the injury or death." See, also, *infra*, § 31.

p. 172, n. 51. *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622. Summons and complaint in a common-law action will not serve as notice under the statute.

p. 172, n. 52. See *Johnson v. Roach*, 83 App. Div. 351, 13 N. Y. Ann. Cas. 86, 82 N. Y. S. 203, and *infra*, n. 75.

p. 172, n. 54. The New York Act provides "if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment." The difference in phraseology between this provision and the Massachusetts act is to be noted. Under the terms of either statute it would seem that if the employe is able during the time provided to give a notice he must do so and it is only when the incapacity has extended over the whole period that any extension is granted him personally. But in case of death apparently the New York statute is more strict than the Massachusetts Act for if during the one hundred and twenty day period the employe became able for a day or two to give a notice and failed to do so it would seem that there could be no action under the statute either by him or his personal representative, while under the Massachusetts Act the employe or his representative is not barred unless it appears that for ten days he was competent but failed to give the notice.

Section 31. Person to Give Notice.*

p. 174. The New York Act contains the same phrase as is found in the Massachusetts Act here quoted.

p. 175, n. 67. Where the attorney's name was signed to the notice by his stenographer, with her initials, to whom he had dictated it, it was a good signature. *Greenstein v. Chick*, 187 Mass. 157.

p. 175. In case of death the New York Act provides that if the employe has not given the notice prescribed, that is a notice within 120 days from the occurrence of the injury or if he has been incapacitated, within ten days after such incapacity has been removed, the executor or administrator may give the notice within sixty days from his appointment. Thus a notice given by an administrator more than 60 days after his appointment is bad. *Holm v. Empire Hardware Co.*, 102 App. Div. 505, 92 N. Y. S. 914. In *Hoehn v. Lantz*, 94 App. Div. 14, 87 N. Y. S. 921, the servant died without having given notice and his administrator gave a notice within 120 days from accident but more than sixty days after his appointment. It was held that the notice was valid and it was not the intention of the legislature in any event to shorten the period of 120 days. In *Randall v. Holbrook, Cabot & Daly Const. Co.*, 95 App. Div. 336, 88 N. Y. S. 681, a notice given by the administrator 76 days after his appointment was held bad, the court saying "Whether this was a greater or less period than the 120 days within which the employe was required to give notice to sustain the action against the employer would seem to be immaterial" and that

* 6 Curr. Law, 537.

in any event the administrator was required to give notice within 60 days from his appointment. It would seem under the New York provision that if the employe was himself able to give a notice within the prescribed time, and its extension in case of incapacity, but failed to do so, his executor or administrator could not give a notice after his death. But if before the expiration of such prescribed time the employe dies, his executor or administrator may give the notice. In such case the time within which the executor or administrator may give the notice is fixed at sixty days after his appointment and the better view seems to be that this sixty day limitation governs irrespective of the question whether it comes within or beyond the one hundred and twenty days prescribed for the giving of notice by the employe himself. The purpose of the notice is to give as early information of the claim to the employer as is consistent with the ability of the injured man to give it. Whether the period be fixed at thirty days, as at first it was in the Massachusetts act, or at one hundred and twenty days as it is in the New York act, is material only as limiting a time within which it is reasonable to expect that the injured employe will have recovered sufficiently to attend to it. This reason does not apply to his executor or administrator and, therefore, a proper construction of the provision would seem to require the personal representative to give the notice within sixty days after his appointment whether that period falls within or without the one hundred and twenty days' limitation. In any event the notice must be given before the expiration of one year from the occurrence of the accident which is the time limited for bringing suit.

Section 32. To Whom and How Notice is to be Given.*

p. 177. The New York Act (See Appendix p. 703) provides that "the notice required by this section shall be served on the employer or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such coporation."

p. 178, n. 75. The Kansas railroad statute requires notice, and service of the notice as a summons is served is considered proper, and making service on a ticket agent was held good. *St. Louis & S. F. R. Co. v. Burgess* [Kan.] 83 P. 991; *Healey v. George F. Blake Mfg. Co.*, 180 Mass. 270, holds that the notice is not a "process" and service of it on the commissioner of corporations where the employer is a foreign corporation is not a proper service even though the commissioner forwards it to the employer within the time limit. The service of a highway notice is not the "commencement of an action" and declarations of deceased persons, under a Massachusetts evidence stat-

* 6 Curr. Law, 587.

ute, are admissible when made after service of notice but before bringing of writ. *Dickinson v. City of Boston* [Mass.] 75 N. E. 68. Service of complaint is not service of notice. *Johnson v. Roach*, 83 App. Div. 351, 13 N. Y. Ann. Cas. 86, 82 N. Y. S. 203.

p. 178, n. 78. Where an agent of plaintiff on the evening of the last day left the notice with the household servant of one of the selectmen it was a sufficient service and it is immaterial that the selectman did not read it for three days afterward. *McCarthy v. Inhabitants of Dedham*, 188 Mass. 204.

Section 33. Effect of Notice.*

p.180. *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622; purpose of notice.

p. 184, n. 89. Where the notice served by the plaintiff contained the statement that plaintiff was in the employ of the defendant, the plaintiff cannot later claim that he was employed by a different company. *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. 134, 91 N. Y. S. 883.

Section 34. Limitation of Action.

p. 185, n. 91. The New York Act requires that the action be commenced within one year after the occurrence of the accident. See *Safety Appliance Statute*, Wash. Sess. Laws 1905, c. 84, § 9.

Section 35. Amendments.†

p. 188, n. 100. "If it can properly be said that in the amended complaint the appellant stated a cause of

* 6 Curr. Law, 476.

† 6 Curr. Law, 587.

action different from that stated in the original complaint, the judgment herein must be sustained. In general an amendment to a complaint relates to the commencement of the action; but if the amendment sets up a claim or title not previously asserted against which the statutory period of limitation has run, the statute of limitations may be invoked successfully." *Fleming v. City of Anderson* [Ind. App.] 76 N. E. 266.

p. 188, n. 101. Amendment stating cause of action in a different way is not barred. *Illinois Car & E. Co. v. Walch*, 132 Ala. 490. A new paragraph describing engineer's negligence in a different way is not barred. *Cleveland, C. C. & St. L. R. Co. v. Bergschicker*, 162 Ind. 108.

p. 188, n. 102. Plaintiff brought suit against a company which had leased and ceased to operate its road and sought to amend his writ by inserting the name of the new company which had taken the lease. At the time of proposing the amendment the statute of limitations had run against the new defendant but it was held that as the suit had been seasonably brought upon the cause of action the amendment should be allowed. *McLaughlin v. West End St. R. Co.*, 186 Mass. 150.

p. 189. Plaintiff brought suit under the labor law and after nonsuit attempted to amend by bringing it under Employers' Liability Act but it was held that the amendment could not be allowed so as to give any rights on appeal from the nonsuit. *Sutherland v. Ammann*, 98 N. Y. S. 574.

Section 36. Conflict of Laws.*

p. 190, n. 111. *International Nav. Co. v. Lindstrom* [C. C. A.] 123 Fed. 475; *Williams v. Quebec S. S. Co.*, 126 Fed. 591; two years' limitation in New York death statute relates to cause of action and time is not to be extended to cover appointment of an administrator.

p. 190, n. 112. *Southern R. Co. v. Mayes* [C. C. A.] 113 Fed. 84.

p. 191, n. 117. *Pullman Co. v. Woodfolk*, 121 Ill. App. 321.

* 6 Curr. Law, 467.

CHAPTER IV.

DEFECT IN CONDITION.

- § 37. Common Law.**
- 38. Effect of Clause.**
- 39. Defect in Condition.**
- 40. Permanence.**
- 41. Negligent User.**
- 42. Connected with or Used in.**
- 43. Ways, etc., in Process of Construction or Destruction.**
- 44. Ways, etc., must be Furnished by Master.**
- 45. Ways.**
- 46. Works.**
- 47. Machinery.**
- 48. Plant.**
- 49. Negligence.**
- 50. Res Ipsa Loquitur.**
- 51. Statutory Enactments.**
- 52. Negligence of the Employer.**
- 53. Negligence of a Person Intrusted.**
- 54. Court or Jury.**

Section 37. Common Law.*

p. 193, n. 1. *Pantzar v. Tilly Foster M. Co.*, 99 N. Y. 368. Master is not bound to furnish reasonably safe places, machinery, and the like and to keep them in a reasonably safe condition of repair, but his duty is to exercise ordinary care to furnish reasonably safe places and the like and to exercise ordinary care to maintain them in a reasonably safe condition. Ar-

* 6 Curr. Law, 537.

mour & Co. v. Russell [C. C. A.] 144 Fed. 614. Defendant might be found negligent for furnishing a chisel made from unsuitable coarse grained steel. Crilley v. New Amsterdam Gas Co., 106 App. Div. 127, 94 N. Y. S. 102.

p. 194, n. 3. In order to comply with U. S. statutes defendant substituted a short pilot on its locomotive for a long one whereby the locomotive was overturned when it struck a cow. Defendant not negligent. Briggs v. Chicago & N. W. R. Co. [C. C. A.] 125 Fed. 745; Kilpatrick v. Choctaw, O. & G. R. R. Co. [C. C. A.] 121 Fed. 11 (unblocked frogs). Custom obtaining among other employers is admissible but not controlling evidence. Louisville & N. R. R. Co. v. Jones, 130 Ala. 456 (jack screws); Northern Ala. R. R. Co. v. Mansell, 138 Ala. 548 (stock gap near track); Devaney v. Degnon-McLean Const. Co., 79 App. Div. 62, 79 N. Y. S. 1050; Id., 178 N. Y. 620 (method of excavating); Bookman v. Masterson, 83 App. Div. 4, 81 N. Y. S. 962 (using stick between locomotive and car to push latter); Dolan v. Boott Cotton Mills, 185 Mass. 576 (gears on machine).

p. 195, n. 4. Need not use the most approved machinery or methods. Healey v. Buffalo R. & P. R. Co., 97 N. Y. S. 801 (water gauge); O'Neil v. Karr, 110 App. Div. 571, 97 N. Y. S. 148 (method of blasting); Skapura v. National Sugar Ref. Co., 83 App. Div. 21, 81 N. Y. S. 1085 (bucket hook); Paul v. Westinghouse C. K. & Co., 99 N. Y. S. 356 (machine made hammer); McDonnell v. New York, N. H. & H. R. Co. [Mass.] 78 N. E. 548 (ladder); Dickeschied v. Betz, 80 App. Div. 8, 80 N. Y. S. 175; Id., 175 N. Y. 611 (lantern used when

cask varnished); *Hart v. Village of Clinton*, 100 N. Y. S. 1092 (extension ladder). Not negligent to use freight cars without bumpers. *Filbert v. New York, N. H. & H. R. Co.*, 95 App. Div. 199, 88 N. Y. S. 438.

p. 195, n. 5. If it is alleged that defendant built the derrick no further allegation of knowledge is necessary. *Consolidated Stone Co. v. Morgan*, 160 Ind. 241. Where master undertakes to design and install his own plant he cannot relieve himself of duty to provide proper appliances by employing competent engineers, not in his general employ, to design, set up or inspect it. Explosion of steam pipe. *Erickson v. American S. & W. Co.* [Mass.] 78 N. E. 761. Purchase from approved makers and inspection. *Nordquist v. Fuller*, 182 Mass. 411 (chain); *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338 (emery wheel burst); *Koehler v. New York S. Co.*, 71 App. Div. 222, 75 N. Y. S. 597; 84 App. Div. 221, 82 N. Y. S. 588 (steam pipe). This rule does not apply where defect is obvious. *Feeney v. York Mfg. Co.*, 189 Mass. 336. For a case where purchaser of boiler sued maker for damages paid plaintiff's servants injured through explosion, see *Boston Woven Hose & R. Co. v. Kendall*, 178 Mass. 232. Latent defects. *La Point v. Howland Paper Co.*, 77 N. Y. S. 669 (steam main); *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509 (brake staff); *Stackpole v. Wray*, 74 App. Div. 310, 77 N. Y. S. 633; 99 App. Div. 262, 90 N. Y. S. 1045 (bolt in elevator); *Newton v. New York Cent. & H. R. R. Co.*, 96 App. Div. 81, 89 N. Y. S. 23; *Id.*, 183 N. Y. 556 (inspection of air hose on train); *Smith v. New York Cent. & S. L. R. Co.*, 86 App. Div. 188, 83 N. Y. S. 259; *Id.*, 178 N. Y. 635 (inspection of air hose).

p. 197, n. 10. Northern Ala. R. R. Co. v. Mansell, 138 Ala. 548 (duty of constructing stock gap cannot be delegated); Chisholm v. New England Tel. & T. Co., 185 Mass. 82 (duty of driving pins in poles cannot be delegated); Pantzar v. Tilly Foster M. Co., 99 N. Y. 368; Vogel v. American Bridge Co., 88 App. Div. 68, 84 N. Y. S. 799; Id., 180 N. Y. 373 (not act of master to select a suitable rope when a proper supply has been furnished); Madigan v. Oceanic S. Nav. Co., 178 N. Y. 242 (not using lamps provided).

Section 38. Effect of Clause.*

p. 201, n. 19. New York 1902, c. 600, § 1, cl. 1. "By reason of any defect in the condition of the ways, works, or machinery, connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition." Also New York Laws 1906, c 657. "If an employe engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools, or implements, or of any car, train, locomotive, or attachment thereto, belonging, owned or operated, or being run and operated, by such corporation or receiver, when such defect could have been discovered by such corporation or receiver, by reasonable and proper care, tests, or in-

* 6 Curr. Law, 537.

spection, such corporation or receiver shall be deemed to have had knowledge of such defect before and at the time such jury is sustained; and when the fact of such defect shall be proved . . . the same shall be prima facie evidence of negligence on the part of such corporation or receiver." See, also, Penn. Act 1907, in Appendix.

p. 202, n. 20. *Cleveland, C. C. & St. L. R. Co. v. Scott*, 29 Ind. App. 519. At common law or under the Employers' Liability Act the defendant is bound to inspect hickory timber used as a jack in raising safe. Timber broke owing to dry rot. *Meehan v. Atlas S. M. & M. T. Co.*, 94 App. Div. 306, 87 N. Y. S. 1031.

p. 203, n. 21. "So far as defects in the ways, works, and machinery are concerned, there is no difference between the liability under the Employers' Liability Act (Rev. Laws, c. 106, § 71, cl. 1) and at common law, except in the amount which can be recovered." *McCafferty v. Lewando's F. D. & C. Co.* [Mass.] 80 N. E. 460 (hole in floor).

Section 39. Defect in Condition.*

p. 204, n. 26. See *Davis v. Broadalbin Knitting Co.*, 90 App. Div. 567, 86 N. Y. S. 127; *Id.*, 185 N. Y. 613, where machine was all right but plaintiff had to crawl under to clean it; no defect.

p. 209, n. 34. Absence of device to prevent belt slipping from tight to loose pulley may be a defect. *Houston Biscuit Co. v. Dial*, 135 Ala. 168.

* 6 Curr. Law, 544.

Section 40. Permanence.*

p. 211. See *Urquhart v. Smith & Anthony Co.* [Mass.] 78 N. E. 410; a walk on which snow and ice has accumulated is a defective way.

p. 211, n. 40. Temporary bridge made by laying three planks alongside "cannot be considered ways or works within the statute. They were used merely for a temporary purpose." *Morris v. Walworth Mfg. Co.*, 181 Mass. 326. Pile of bales in freight house not ways, works, or machinery. *Cahill v. Boston & M. R. Co.*, 190 Mass. 421. A car not owned by defendant but used as a passageway between platform and other cars may be a way. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21. Casting being put in place fell. Not a part of ways, works, or machinery. *Nye v. Dutton*, 187 Mass. 549. Damp moulds. *Haslin v. National Foundry Co.*, 106 App. Div. 152, 94 N. Y. S. 101. Compare with *Whittaker v. Bent*, 167 Mass. 588.

Section 41. Negligent User.*

p. 213, n. 42. Hatchway in vessel uncovered so that other employes might use it is not a defect. *Bamford v. G. H. Hammond Co.*, 191 Mass. 479. Opening in floor ordinarily covered by grating and used as ventilator. Grating had been removed and not replaced by servant. *Horrigan v. Boston El. R.*, 190 Mass. 577. Trap door in floor unknown to plaintiff used by servants and left unguarded though barriers were furnished. Defendant liable. *Farlardeau v. Hoar*, 192 Mass. 263.

* 6 Curr. Law, 540.

* 6 Curr. Law, 539.

p. 213, n. 44. Ladder slipped and hammer that servant was using fell on plaintiff. Servant may have been careless in fastening ladder or in placing hammer. Not a defect in ways, works or machinery. *Fay v. Wilmarth*, 183 Mass. 71. Servant dropped a bar on plaintiff. *Koszlowski v. American Locomotive Co.*, 96 App. Div. 40, 89 N. Y. S. 55. Pulling out extension ladder and using it as staging. *Jacobson v. Faver* [Mass.] 78 N. E. 763. Walking on planks laid across girders to guard against falling brick and plank broke. *Hogan v. Strauss*, 104 App. Div. 623, 93 N. Y. S. 850. Ladder slipped. *Hart v. Village of Clinton*, 100 N. Y. S. 1092. Extension ladder defective and fixed by servants with old rope broke. This makeshift was not a part of the ways, works, or machinery, or furnished by the defendant, but was a device of the servants. *Higgins v. Higgins*, 188 Mass. 113. See, also, rope sling and derrick device made up of some materials not furnished by master. *Hackett v. Masterson*, 88 App. Div. 73, 84 N. Y. S. 751. Skid between cars slipped; placing of skids left to servants and cleats were provided. *Hayes v. New York, N. H. & H. R. Co.*, 187 Mass. 182. Compare with *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18. Choosing to cross pit on weak brace rather than walking around it. *Gillette v. General Elec. Co.*, 187 Mass. 1. Plaintiff carried belt over pulleys and it caught on shaft. *Wade v. John Thompson Press Co.*, 144 Fed. 305. Servant supported himself by band intended only to hold sign on car in place. *Carroll v. Union R. of New York City*, 101 N. Y. S. 745. Three legged derrick fell because weight being lifted was not properly attached. *Rosa v. Volkening*, 64

App. Div. 426; *Id.*, 173 N. Y. 590. Operation of derrick. *Walters v. George A. Fuller Co.*, 74 App. Div. 388, 77 N. Y. S. 681; *Id.*, 82 App. Div. 254, 81 N. Y. S. 919. Caving of earth because sheathing furnished was not used. *Litchfield v. Buffalo R. & P. R. Co.*, 73 App. Div. 1, 76 N. Y. S. 80. Where earth fell and plaintiff working at night claimed that he was injured because he could not see, it was held that the duty of furnishing appliances "is an active duty, and it is not performed on the part of the master by placing materials for electric lights where they may be used at the command of the foreman, under the circumstances disclosed by the evidence in this case." *Devaney v. Degnon-McLean Const. Co.*, 79 App. Div. 62, 79 N. Y. S. 1050; *Id.*, 178 N. Y. 620. Where chain broke through a defective link, the fact that other and stronger chains were furnished and plaintiff selected the one which broke will not relieve defendants because the one selected did not have its apparent strength. *Ford v. Eastern, B. & S. Co.* [Mass.] 78 N. E. 771. Improper rope selected. *Ivers v. Minnesota Dock Co.*, 84 App. Div. 27, 82 N. Y. S. 193; *Agresta v. Stevenson*, 98 N. Y. S. 594. Rope broke not because of defect but because of strain brought on it through load catching on hatch of vessel. *The Fulton*, 143 Fed. 591. Derrick so arranged that load swung over car unless guy rope used and servant neglected to use it. *Mulligan v. Ballou*, 73 App. Div. 486, 77 N. Y. S. 214. Overloaded chain broke. *Nordquist v. Fuller*, 182 Mass. 411. Using crowbar improperly to pry off endless chain. *Wolfe v. New Bedford Cordage Co.*, 189 Mass. 591. Hatch cover improperly placed by servant. *McDonnell v. Oceanic Steam Nav. Co.* [C. C.

A.] 143 Fed. 480. Dropping cover down chute. *Brust v. J. T. Perkins Co.*, 99 N. Y. S. 212. Servant while remedying a defect injured plaintiff. *Nye v. Dutton*, 187 Mass. 549. Servant used a ladder which servants had placed at broken stairway; there was another stairway. Ladder broke. *Darritt v. Metropolitan St. R. Co.*, 106 App. Div. 567, 94 N. Y. S. 790.

Section 42. Connected with or Used in.*

p. 215, n. 46. Where the servant of a stevedore fell through a hatch on a vessel, not owned by defendant but which he was unloading, because cover had been improperly placed by fellow workmen, there was no liability and the vessel was not part of defendant's ways, works and machinery. *Hyde v. Booth*, 188 Mass. 290; *Bamford v. G. H. Hammond Co.*, 191 Mass. 479. See *Huebner v. Hammond*, 80 App. Div. 122, 80 N. Y. S. 295. Where a car of coal had been sent into defendant's yard and defendant's servant was directed to unload it and was hurt by a defect in the car, it was held that as defendant did not own car and was not accustomed to inspect cars sent in there was no liability and car was not a part of the ways, works, or machinery. *Dunn v. Boston & N. St. R. Co.*, 189 Mass. 62. Where, however, a car not owned by defendant was used as a passageway between a platform and other cars which were being unloaded and an employe passing across it was injured by stepping in a hole in the floor, it was held that although the car was not a permanent part of the defendant's ways it was utilized as such and be-

* 6 Curr. Law, 539.

came "one of the instruments of its business" and for defects in it the master was liable both at common law and under the statute. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21. Defendant permitted another company to erect a bridge over defendant's tracks and defendant continued to operate its trains under it; bridge part of defendant's ways, works, or machinery. *Central of Georgia R. v. Alexander* [Ala.] 40 So. 424.

p. 216, n. 49. Plaintiff, employed by defendant, while backing up train on "dead track" collided with a car standing there owing to negligence of depot company's switchman. Depot company owned track but several railroads were allowed to use it. No liability. *Brady v. Chicago & G. W. R. Co.* [C. C. A.] 114 Fed. 100.

p. 217, n. 51. *New York C. & St. L. R. Co. v. Hamlin* [Ind.] 79 N. E. 1040. Common-law duty. *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398. Improperly loaded foreign cars: defendant bound to inspect. *Roche v. Denver & R. G. R. R. Co.*, 19 Colo. App. 204. Car not owned by defendant but used as a passageway between platform and other cars is a way. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21. Where defendant kept a consignment of freight in a foreign car and directed consignee to unload it from such car, it might be held to have adopted car as its storehouse and failed to provide a proper place for delivery when consignee's servant is injured by defect in car. *Ladd v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 742.

p. 218, n. 54. See *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21.

p. 218, n. 55. Where a servant was sent to replace

a broken casting in an elevator with a new one, and permitted the casting to fall on plaintiff, it was held that there was no defect. It was the "duty of defendant to remedy the defect and while this was being done the accident happened through the carelessness of the fellow-servant of the plaintiff. The statute does not cover such a case. An appliance does not become a part of the ways, works, or machinery, until it becomes a part of the permanent structure or plant." *Nye v. Dutton*, 187 Mass. 549. A machine on which plaintiff worked broke down and he was told that a new one was ordered. The following day the plaintiff and others were moving the broken machine to a corner out of the way when a lever fell from it and injured plaintiff. The county court held for plaintiff but the divisional court reversing this judgment (1901, 2 K. B. 483) held that the machine at the time of the injury was not ways, works, or machinery. "The contention of the plaintiff is that the machine was connected with or used in the business until it had arrived at its final resting place in the corner; but I do not think that that is the point at which the line can be drawn; the line of time must, in my opinion, be drawn at the point when the machine finally ceased to be used in the employer's business—the old machine ceased to be machinery or plant connected with or used in the defendant's business as soon as the determination had been arrived at, and had been communicated to the hands, that it was to be used no more; after that it was not kept for employment in the business at all." This judgment was reversed in the court of appeals (1902, 1 K. B. 233) the court saying that the machine was

part of the plant since it was in such physical contiguity to the rest of the plant that it had to be removed out of the way by order of the foreman and there was no evidence of absence of intention to repair it. " 'Used in the business of the employer' do not in my opinion mean that the plant must be in use at the moment when the injury occurs to the workman, and a machine does not cease to be plant in the interval between giving an order that it shall be repaired and the completion of the repair. . . . The evidence seems to show that the machine had ceased to be used in the business; but the question arises whether it had ceased to be connected with the business. . . . I do not feel justified in saying that there was no evidence that the machine was not, when the accident occurred, machinery or plant connected with the business." *Thompson v. City Glass Bottle Co.* [1901] 2 K. B. 483; [1902] 1 K. B. 233.

Section 43. Ways, etc., in Process of Construction or Destruction.*

p. 221, n. 60. See *Rippucci v. Commonwealth Const. Co.*, 190 Mass. 518, where it is held that the several statutes relating to elevators do not apply to an elevator temporarily used as a part of the ways, works, and machinery in the construction of a building, but only to elevators which are a part of the building as such.

p. 222, n. 61. Plaintiff sent to clear up unused room and hurt by defect in floor. No liability. *O'Keefe v. John P. Squire Co.*, 188 Mass. 210. See *McDonough v.*

* 6 Curr. Law, 537.

Clonbrock Steam Boiler Co., 99 N. Y. S. 263 (gallery being constructed fell because riveting had not been properly done. Safe place to work rule does not apply).

Section 44. Ways, etc., must be Furnished by the Master.*

p. 222, n. 62. Callahan v. Phillips Academy, 189 Mass. 183. See, also, Ford v. Eastern B. & S. Co. [Mass.] 78 N. E. 771.

p. 223, n. 65. On a certain machine belts had to be changed frequently and one broke; it was a question for the jury whether the belt was ways, works, or machinery. Boucher v. Robeson Mills, 182 Mass. 500. Assumed that a chain used to raise plank was ways, works, or machinery. Nordquist v. Fuller, 182 Mass. 411. Jackscrews used to raise derailed car are not ways, works, or machinery. Louisville & N. R. Co. v. Jones, 130 Ala. 456. See *infra*, § 48, note 98.

p. 224, n. 66. Plaintiff cut knife blades out of unannealed steel instead of annealed steel which had previously been furnished him. Unannealed steel was improper material to use. A spark flew from it into plaintiff's eye. Defendant's negligence was for jury. Arnold v. Harrington Cutlery Co., 189 Mass. 547.

Section 45. Ways.*

p. 225, n. 69. Plank used as bridge over ditch broke. Birmingham Rolling Mills Co. v. Rockhold, 143 Ala. 115. Twisted, unsteady, and unwedged runway over which plaintiff was wheeling barrow. Daily v. Fiber-

* 6 Curr. Law, 537.

loid Co., 186 Mass. 318. Temporary bridge made of three planks used merely for temporary purpose, not within statute. *Morris v. Walworth Mfg. Co.*, 181 Mass. 326. Empty freight car used as passageway between platform and other cars, comes within statute though not owned by defendant. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21. As to skids used between cars, see *Hayes v. New York, N. H. & H. R. Co.*, 187 Mass. 182. *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18. Barriers of iron posts along runway. *Grant v. Cashman*, 183 Mass. 13. See *Wazenski v. New York Cent. & H. R. Co.*, 180 N. Y. 466.

p. 225, n. 73. Track sloping toward mouth of mine. *Tanner v. Harper*, 32 Colo. 156. Stock gap too near track. *Northern Ala. R. Co. v. Mansell*, 138 Ala. 548. Gauge of track too narrow causing derailment. *Birmingham Trac. Co. v. Reville*, 136 Ala. 335. Culvert too small to carry off water. *Western R. of Ala. v. Russell*, 39 So. 311.

p. 225, n. 74. A plank walk from factory to privy used by servants is a "way" and if it is covered with accumulated and trampled ice and snow it is defective. *Urquhart v. Smith Anthony Co.*, 192 Mass. 257. See *Neagle v. Syracuse, B. & N. Y. R. Co.*, 185 N. Y. 270; ice on track derailed snow plow. No negligence; removal of ice or snow a detail that might properly be left to servants.

p. 225, n. 75. Trap doors. *Farlardeau v. Hoar*, 192 Mass. 263; *Horrigan v. Boston El. R. Co.*, 190 Mass. 577. See *Bateman v. New York Cent. & H. R. R. Co.*, 178 N. Y. 84. Hatch cover. *McDonnell v. Oceanic Steam Nav. Co.* [C. C. A.] 143 Fed. 480. Cover

over elevator hole. *Connors v. Merchants Mfg. Co.*, 184 Mass. 466. Cement dripping in front of machine and making floor slippery. No negligence. *McRea v. Hood Rubber Co.*, 187 Mass. 326. Absence of telltales on bridge. *Central of Ga. R. v. Alexander* [Ala.] 40 So. 424.

Section 46. Works.*

p. 227, n. 79. Painter built staging from materials furnished. *Callahan v. Phillips Academy*, 180 Mass. 183. Plank selected from stock and used for staging. *Thompson v. City of Worcester*, 184 Mass. 354. Carpenters ordered to move a staging and did so carelessly. *White v. Unwin*, 188 Mass. 490. Painters using extension ladder as staging. *Jacobson v. Favor* [Mass.] 78 N. E. 763. Scaffold built by servants from stock of suitable materials. *Phoenix Bridge Co. v. Castleberry* [C. C. A.] 131 Fed. 175. Partition put up and moved by servants. *Galow v. Chicago, M. & St. P. R. Co.* [C. C. A.] 131 Fed. 242.

p. 228, n. 80. Superintendent directed building of platform. *White v. Wm. H. Perry Co.*, 190 Mass. 99. Work of building staging entrusted to boss carpenter. *Chambers v. American Tin Plate Co.* [C. C. A.] 129 Fed. 561. Defendant's servants carelessly shifted staging used by servant of contractor. *Parsons v. Hecla Iron Wks.*, 186 Mass. 221. Staging raised from time to time under direction of superintendent. *Solari v. Clark*, 187 Mass. 229.

p. 228, n. 81. *Feeney v. York Mfg. Co.*, 189 Mass. 336.

* 6 Curr. Law, 537.

p. 229, n. 84. Roof of mine. Tutwiler, C. C. & I. Co. v. Farrington, 39 So. 898. Fall of crane. Southern C. & F. Co. v. Jennings, 137 Ala. 247. Defective switch. Cleveland, C. C. & St. L. R. Co. v. Snow [Ind. App.] 74 N. E. 908; Birmingham Trac. Co. v. Reville, 136 Ala. 335; Southern C. & C. Co. v. Swinney, 42 So. 808. Iron ladder in vessel had defective rung. Carroll v. Metropolitan Coal Co., 189 Mass. 159. Defective pin in telegraph pole. Chisholm v. New England Tel. & T. Co., 185 Mass. 82. Rail charged with electricity. Keeley v. Boston El. R. Co. [Mass.] 78 N. E. 490. Pile of bales in freight house not within statute. Cahill v. Boston & M. R. Co., 190 Mass. 421. Gate of freight elevator fell. Hill v. Iver Johnson S. G. Co., 188 Mass. 75. Elevator jolted. Finnegan v. Winslow Skate Mfg. Co., 189 Mass. 580. Steam pipe exploded. Erickson v. American, S. & W. Co. [Mass.] 78 N. E. 761. Newly laid brick wall. Meehan v. Hogan, 100 N. Y. S. 1008. See common-law cases. Bursting of steam pipe. La Point v. Howland Paper Co., 77 N. Y. S. 669; Krueger v. Bartholomay Brew. Co., 94 App. Div. 58, 87 N. Y. S. 1054; Koehler v. New York Steam Co., 71 App. Div. 222, 75 N. Y. S. 597; Id., 84 App. Div. 221, 82 N. Y. S. 588. Steam turned into defective tank. Franck v. American Tartar Co., 91 App. Div. 571, 87 N. Y. S. 219. Fall of elevator. Swenson v. Metropolitan St. R. Co., 78 App. Div. 379, 80 N. Y. S. 281; Ingram v. Fosburgh, 73 App. Div. 129, 76 N. Y. S. 344; Young v. Mason Stable Co., 96 App. Div. 305, 89 N. Y. S. 349. Rotten electric light pole fell. Rowley v. American Ill. Co., 83 App. Div. 609, 81 N. Y. S. 1099. Defective insula-

tion. *Irish v. Union B. P. Co.*, 103 App. Div. 45, 92 N. Y. S. 695, Id., 183 N. Y. 508. Too narrow slot in rail through which plow of car passes. *McCann v. Interurban St. R. Co.*, 102 N. Y. S. 296. Pit in car barn. *Dulfer v. Brooklyn Heights R. Co.*, 101 N. Y. S. 207. Fall of lump of lime paste. *Simons v. Kirk*, 173 N. Y. 7.

Section 47. Machinery.

p. 230, n. 87. "Buggy" used to move iron beams is not a mechanical contrivance within the statute. *Pluckham v. American Bridge Co.*, 104 App. Div. 404, 93 N. Y. S. 748.

p. 231, n. 92. Defective drawhead. *Kansas City M. & B. R. Co. v. Flipppo*, 138 Ala. 487. Dull tongs to lift hot ingot. *Mulligan v. Colorado F. & I. Co.*, 20 Colo. App. 198. Bucket in shaft fell. *Coe v. Van Why*, 33 Colo. 315. Derrick rope broke. *Clear Creek Stone Co. v. Dearmin*, 160 Ind. 162. Iron hook on derrick broke. *New Castle Bridge Co. v. Steele* [Ind. App.] 78 N. E. 208. Chain broke. *Ford v. Eastern B. & S. Co.* [Mass.] 78 N. E. 771. Bolts broke letting molten iron fall. *Harris v. Putnam Mach. Co.*, 188 Mass. 85. Bolt holding treadle broke. *Hannan v. American S. & W. Co.* [Mass.] 78 N. E. 749. See also *Gould v. Boston El. R. Co.*, 191 Mass. 396. Breaking of rim of basket on washing machine. *McGuinness v. Lehan* [Mass.] 79 N. E. 265. Emery wheel burst. *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338. Pulley coming off shaft. *Ellis v. Thayer*, 183 Mass. 309. Defective pulley caught

* 6 Curr. Law, 537.

belt. Norton-Reed Stone Co. v. Steele, 32 Ind. App. 48. Stationary engine defective. Sloss-Sheffield S. & I. Co. v. Hutchinson, 40 So. 114. Shuttle flying from loom because of defective guard. Chambers v. Wampanoag Mills, 189 Mass. 529. Machine insecurely fastened vibrated and caused weight to fall. Creamery P. Mfg. Co. v. Hotsenpiller, 159 Ind. 99. Machine started by slipping of belt from loose to tight pulley. Houston Biscuit Co. v. Dial, 135 Ala. 168; Fountaine v. Wampanoag Mills, 189 Mass. 498. Common-law cases. Hole in casing about shaft. Levy v. Grove Mills Paper Co., 80 App. Div. 384, 80 N. Y. S. 730. Dampness of moulds. Hustin v. National Foundry Co., 106 App. Div. 152, 94 N. Y. S. 101. Lever of printing press flying back. Creswell v. United Shirt & C. Co., 100 N. Y. S. 497. Knife flying out of moulding machine because bolt broke. Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7. Cable on mine bucket broke. Owen v. Retsof Min. Co., 102 App. Div. 130, 92 N. Y. S. 270. Derrick. Wagner v. New York, C. & St. L. R. Co., 76 App. Div. 552, 78 N. Y. S. 696, Id., 93 App. Div. 14, 86 N. Y. S. 921. Jack switch. Loushay v. Erie R. Co., 75 App. Div. 619, 78 N. Y. S. 144, Id., 95 App. Div. 102, 88 N. Y. S. 446, Id., 184 N. Y. 583. Servant turned the wrong switch which caused a commutator to become so heated that it burst and injured plaintiff. If defendant had used an automatic current breaker and an approved fuse the accident could not have happened. Held defendant liable and that its failure to provide such device concurred with servant's negligence. Strong dissenting opinion. Kremer v. New York Edison Co., 102 App. Div. 433, 92 N. Y. S. 883.

Section 48. Plant.*

p. 233, n. 96. See at common law. *Carena v. Zammatti*, 82 App. Div. 11, 81 N. Y. S. 463.

p. 233, n. 97. Probably a telegraph pole is "plant." *Cleveland, C. C. & St. L. R. Co. v. Scott*, 29 Ind. App. 519.

p. 233, n. 98. Pieces of timber used to block cars are part of the "plant" though not ways, works, or machinery. "So far as these several cases (*Georgia Pac. R. Co. v. Brooks*, 84 Ala. 138; *Birmingham F. & M. Co. v. Goss*, 97 Ala. 220; *Clements v. Alabama, G. S. R. Co.*, 127 Ala. 166; *Southern R. Co. v. Moore*, 128 Ala. 434) may be taken as declaring that the tools, implements, and appliances referred to constituted no part of the plant connected with or used in the business of the defendants in them respectively, within the meaning of the statute, their soundness is very questionable. The doctrine of general acceptance in other jurisdictions is that the statute term 'plant' comprises whatever apparatus, fixtures, or tools, a master uses in his business." *Sloss-Sheffield S. & I. Co. v. Mobley*, 139 Ala. 425. Small stick used to wedge back shipper of machine is plant. *Going v. Alabama, S. & I. Co.*, 141 Ala. 537. It is queried whether there is any distinction between implements used to repair the ways, works, or machinery and implements which are a necessary part of the ordinary work and the court, properly it would seem, think not. *Sloss-Sheffield S. & I. Co. v. Mobley*, 139 Ala. 425.

p. 233, n. 99. . And New York.

* 6 Curr. Law, 537.

p. 233, n. 101. Hand car is not a tool in the sense that defendant need not inspect it. *Chicago I. & L. R. Co. v. Tackett*, 33 Ind. App. 379. See, also, § 44.

Section 49. Negligence.*

p. 234, n. 102. Evidence that on morning of accident "ripsaw wobbled" not enough to show defect or that defendant knew of it. *Yates v. Huntsville, H. & H. Co.*, 39 So. 647. Where machine became defective a few minutes before accident and notice of it did not come to master or foreman but only to fellow-servants. There was no liability. *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. S. 307. Elevator suddenly raised owing to defect in hydraulic cylinder. *Carnegie Steel Co. v. Byers* [C. C. A.] 149 Fed. 667. Evidence of changes after accident admissible to rebut defendant's testimony as to measurements of distance of object from track. *Choctaw O. & G. R. Co. v. McDade* [C. C. A.] 112 Fed. 888. There may be recovery for wilful wanton, or intentional negligence under the act. *Louisville & N. R. Co. v. York*, 128 Ala. 305.

p. 234, n. 104. See note 111, *infra*.

p. 235, n. 105. Fact that inspection two days before accident disclosed no defect does not, as a matter of law, show that no defect existed. *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206. Master cannot be guilty of negligence until a sufficient time has passed to enable him to repair the defect or notify the servant of the danger. *Malott v. Sample*, 164 Ind. 645. "It is not the law that when the master is apprised of a de-

* 6 Curr. Law, 544.

fective place, he is not liable if he continues to offer it to the servant provided an accident happens before he can, with due diligence, make the place safe. I know of no such interval of immunity." *Franck v. American Tartar Co.*, 91 App. Div. 571, 87 N. Y. S. 219. Where machine become defective a few moments before accident and notice of defect did not come to master or foreman but only to fellow-servant, there was no liability. *Hughes v. Russell*, 104 App. Div. 144, 93 N. Y. S. 307. Burden rests on plaintiff to prove that defect "arose from or had not been discovered, etc." *Birmingham Rolling Mills v. Rockhold*, 143 Ala. 115. Burden of proving allegations in the "defect" clause of act rests on plaintiff. *Tutwiler, C. C. & I. Co. v. Farrington*, 39 So. 898.

p. 235, n. 107. "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if the defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured." *Southern R. Co. v. Williams*, 143 Ala. 212; *South Bend C. P. Co. v. Cissne*, 35 Ind. App. 373.

p. 237, n. 110. "There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurements of the acts, rights, or remedies of mankind." *American Bridge Co. v. Seeds* [C. C. A.]

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144 Fed. 605. Where master undertakes to design and install his own plant, he cannot relieve himself from the duty of providing proper appliances by employing competent engineers to design it and set it up or to inspect it after it is in place. *Erickson v. American S. & W. Co.* [Mass.] 78 N. E. 761.

p. 237, n. 111. *Kinzel v. Atlanta K. & N. R. Co.* [C. C. A.] 137 Fed. 489 (land slide); *Reilly v. Troy Brick Co.*, 108 App. Div. 108, 94 N. Y. S. 576, Id., 184 N. Y. 399 (slipping of clay bank); *Rainbow C. & M. Co. v. Martin*, 35 Ind. App. 658 (missing blow with sledge); *Gibson v. International Trust Co.*, 186 Mass. 454 (elevator stool was moved and boy starting to sit on it fell and falling grasped lever of elevator thereby starting it and causing plaintiff's injury—a pure accident); *Creswell v. United Shirt & C. Co.*, 100 N. Y. S. 497 (lever of printing press flying back and startling plaintiff so that he thrust his hand in gears).

p. 238, n. 112. *Stenger v. Buffalo Union Furnace Co.*, 98 App. Div. 361, 90 N. Y. S. 222.

Section 50. *Res Ipsa Loquitur*.*

p. 240, n. 117. See *Gibson v. International Trust Co.*, 186 Mass. 454 (second trial). A small stone found in a "bath-bun" is prima facie evidence of negligence. *Chaproniere v. Mason*, 21 L. T. R. 633; *Savage v. Marlborough St. R. Co.*, 186 Mass. 203 (collision); *Melvin v. Pennsylvania Steel Co.*, 180 Mass. 196 (chisel dropped on one lawfully in building being erected); *Linton v. Weymouth L. & P. Co.*, 188 Mass. 276 (live wire broken

* 6 Curr. Law, 592.

and swinging in street). Statement of rule, *Houston v. Brush & Curtis*, 66 Vt. 331.

p. 240, n. 118. *Gregory v. American Thread Co.*, 187 Mass. 239 (starting of lap winder); *Hannan v. American S. & W. Co.* [Mass.] 78 N. E. 749 (bolt holding treadle of machine broke); *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338 (emery wheel burst). See New York Laws 1906, c. 657, in Appendix.

p. 241. The Massachusetts courts have gone further than the courts of most other jurisdictions in applying and refining upon the maxim of *res ipsa loquitur* not only in cases of carriers but in master and servant cases where the scope of the maxim is most limited. It has been said that "the cause relied on has to be set against the total of other possible causes." *Clare v. New York & N. E. R. Co.*, 167 Mass. 39, and "it is not sufficient to show that the injury may have been occasioned by the negligence of those whom he seeks to charge with it. If there were other causes which also might have produced it, he is in some way to show that these did not operate." *Kendall v. City of Boston*, 118 Mass. 234. Thus where a passenger was injured by sawdust blowing from elevated structure into her eye, since this might have happened through causes other than the negligence of defendant or its servants, she was bound to exclude the operation of those causes by a fair preponderance of the evidence. *Wadsworth v. Boston El. R. Co.*, 182 Mass. 572. So where falling snow knocked a traveler down he could not recover where it was conjectural whether the snow came from defendant's structure or not. *McGee v. Boston El. R. Co.*, 187 Mass. 569. Compare *Ugglä v. West End St. R. Co.*, 160 Mass. 351 (iron from over-

head work falling) and *Lowner v. New York, N. H. & H. R. Co.*, 175 Mass. 166 (pail of sand falling from bridge) where the accident gave rise to the inference not only that the thing causing the injury came from defendant's property but that there was negligence with reference to it. Where a passenger was hurt by a window in the car falling it was held that the only inference as to cause was that the window was not properly raised and as there was no evidence that defendant's employes raised it the accident did not show negligence. *Faulkner v. Boston & M. R. Co.*, 187 Mass. 254. A boy found a railway torpedo lying on the track and was hurt by it. The court ruled that the mere fact that a torpedo was left on the track did not warrant the inference that it was left there through the act of an employe in the course of his duty and, therefore, there was no evidence of negligence. *Obertoni v. Boston & M. R. Co.*, 186 Mass. 481, citing many cases. Where, however, a conductor using a stick to free the trolley let it fly from his hands, the inference of negligence was proper. *Manning v. West End St. R. Co.*, 166 Mass. 230. The rule deals only with inferences not with proven causes ("The real cause being shown, there is no occasion to inquire as to what the presumption would have been if the cause had not been shown." *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156) and so it happens that while a plaintiff may make out a prima facie case of negligence by proof of the accident he may by going further and attempting to point out the acts of negligence deprive himself of the benefit of the inference and disclose that he has no case. Thus, where the plaintiff testified that as she left the train

at a station she was hurt by a package thrown from it, she made out a prima facie case, but by going further and showing that the package was thrown from an express car for the acts of the men in which the defendant was not responsible, she could not recover. *Winship v. New York N. H. & H. R. Co.*, 170 Mass. 464. "If we assume that the plaintiff was a passenger, and might have rested his case by showing that the car in which he was riding was derailed, thus making out a prima facie case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened. Unless, therefore, the evidence put in by him tended to show negligence on the part of the defendant, he was not entitled to go to the jury." *Buckland v. New York, N. H. & H. R. Co.*, 181 Mass. 3. The plaintiffs, passengers, "by going as far as they did had made it impossible for themselves to rely upon the mere derailment as evidence of negligence." *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211. While there is no place for inferences when the facts constituting negligence appear, yet where there has been an attempt to point out the negligent act and nothing in evidence save the occurrence itself shows negligence the rule that, in such case, the plaintiff may nevertheless go to the jury and argue the question of negligence on the whole evidence seems perilously close to a rule that the defendant has the burden of proving absence of negligence, and not that the burden of proving negligence rests on the plaintiff. For example, a passenger was injured by the burning out of a fuse which, while not of itself evidence of negligence, was accompanied by such unusual features that it became so and though

both plaintiff and defendant introduced evidence, the cause did not appear; and it was held that "if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption unless they are satisfied that the cause has been shown to be inconsistent with it," and it was also said "an unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it." *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156. See *infra*, § 54. If this means that it is open to argument and to finding by the jury that taking the accident into consideration it more probably arose from this or that suggested cause than from some other cause suggested in the evidence the rule is right for the province of the jury is to weigh the probabilities appearing in evidence. If on the other hand this case means that where several theories have been suggested and no one of them appears as the cause or is evidence of the cause of the accident, then the plaintiff may argue and the jury find that the accident itself shows negligence, apart from the causes suggested, the rule seems to be wrong, for its effect is to compel the defendant to prove his non-liability. In many cases the real cause of the injury is as much a mystery to one side as to the other, and in many cases the cause may be of so hidden or technical a nature that common experience cannot declare that the accident would not have happened had the defendant used proper care. In such cases if the defendant offers any evidence, for example

says "I do not know" there would seem to be no presumption possible. The court may instruct the jury that the fact of the accident is some evidence of negligence though not of itself sufficient to establish negligence (*Carmody v. Boston Gas Light Co.*, 162 Mass. 539; *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156; *Ugla v. West End St. R. Co.*, 160 Mass. 351). But the court is not obliged to single out a fact in the evidence and give it prominence. *O'Neal v. O'Connell*, 167 Mass. 338.

In master and servant cases the court has said that the plaintiff has to go further in his proof than in carrier cases. *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75, and the reason for this, of course, is that the master not only is charged with a less degree of care but that he has more avenues of escape from liability, for example, fellow-servant's negligence, incidental risks of the business, possibly risks voluntarily assumed, though this is really a plea in confession and avoidance, stock of suitable appliances or materials furnished, proper inspection made, latent defects and the like, and the plaintiff's evidence must stop these avenues of escape before an inference of negligence from the fact of the accident can arise. Thus, where an emery wheel burst and it appeared that the wheel had been recently bought in the market, the broken pieces were not in evidence nor was there any evidence as to the condition of their surfaces, nor evidence that a careful inspection would have disclosed anything, nor evidence what the defect was, it was held that though the explosion was evidence of a defect in the wheel the plaintiff was bound to exclude other causes

than the defendant's negligence and this he had not done and he could not recover. *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338. Where a saleswoman was injured by a chest slipping from a shelf and hitting her and it appeared that the chests on the shelf were taken down to show customers and put back and that though there were several chests on the shelf only one slipped off, it was held that there was no inference of negligence and that the plaintiff had not excluded other causes than defendant's negligence. *Hofnaur v. R. H. White Co.*, 186 Mass. 47. So where the gate of a freight elevator had been pushed up by servant and the catch gave the usual click but failed to hold and gate fell, the cause of the fall being unexplained and the gate having previously worked properly, there was no evidence of negligence. *Hill v. Iver Johnson S. G. Co.*, 188 Mass. 75. That the injury may have been caused by fellow-servants or by a stranger "is not relevant as the defendant offered no explanation of this character concerning the accident which the jury could have found was of such a nature that it would not have occurred unless the defendant had permitted the apparatus to become defective:" telephone operator receiving shock. *Cahill v. New Eng. Tel. & T. Co.* [Mass.] 79 N. E. 821. *Contra*, *Chicago Tel. Co. v. Schultz*, 121 Ill. App. 573. It has been said: "Whenever an employe is connected with the act which injures him the presumption is not against the company." *Western & A. R. Co. v. Vandiver*, 85 Ga. 470 (coupling cars) and see *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113 (use of step ladder). Where the cause of the accident clearly appears, then in serv-

ant cases as in the carrier cases above noted there is no room for an inference. *Parsons v. Hecla Iron Works*, 186 Mass. 221, where a staging fell because some workman had knocked away braces, but it did not appear whether the workman was a fellow-servant of the plaintiff or employed by a person other than the plaintiff's master.

The maxim has been applied in the following servant cases: *Bryne v. Boston Woven Hose Co.*, 191 Mass. 40 (plaintiff stopped machine and it started of itself); *Gregory v. American Thread Co.*, 187 Mass. 239 (starting of machine); *Farlardeau v. Hoar*, 192 Mass. 263 (servant temporarily working in building fell through trap door in passage; no warning given that it was open nor were the barriers used); *Hannan v. American S. & W. Co.* [Mass.] 78 N. E. 749 (bolt in machine broke while being used in what jury might consider a reasonable way); *Erickson v. American S. & W. Co.* [Mass.] 78 N. E. 761 (steam pipe burst). The maxim was not applied in these cases: *Cummings v. Masters, etc., of Masons* [Mass.] 81 N. E. 189 (servant—explosion of steam oven, evidence conjectural); *Thompson v. National Fire Works Co.* [Mass.] 81 N. E. 256 (servant—explosion on fire cracker machine).

p. 243, n. 123. *Looney v. Metropolitan R. Co.*, 200 U. S. 480 (uninsulated wire injured lineman); *Texas & P. R. Co. v. Barrett*, 166 U. S. 617 (locomotive boiler exploded). Where tenant was injured by fire and it appeared that defendant's servant lighted matches near combustible material and shortly after fire broke out there, jury might find that he was careless although he testified that he used the matches carefully. *Omaha*

Water Co. v. Schamel [C. C. A.] 147 Fed. 502. "How far that presumption may go, in an action by an employe against an employer, to shift the burden of proof from the former to the latter must depend upon the circumstances of the particular case. The mere fact that the appliance is shown to have been defective is not enough to do so; it must appear that the defect was an obvious one or such as to be ascertainable by the exercise of reasonable care." **Handle of ash bag broke.** **The France** [C. C. A.] 59 Fed. 479. Nitroglycerine exploded and there was evidence that if properly manufactured it would not explode spontaneously and that this explosion was spontaneous. There was no evidence whether it was properly manufactured or not. The jury might infer negligence. **Bradford Glycerine Co. v. Kizer** [C. C. A.] 113 Fed. 894. Not sufficient to show that accident might have arisen from the negligence of an incompetent servant. **Brady v. Western Union Tel. Co.** [C. C. A.] 113 Fed. 909. Plaintiff employed by wharfingers, not by ship, injured by breaking of chain raising a heavy weight. Breaking is some evidence of negligence. **The Schooner Robert Lewers Co. v. Kakanoka** [C. C. A.] 114 Fed. 849; **Mountain Copper Min. Co. v. Van Buren** [C. C. A.] 123 Fed. 61 (cave-in of mine—no inference of negligence); **Chicago & N. W. R. Co. v. O'Brien** [C. C. A.] 132 Fed. 593 (servant hurt by derailment—no inference); **Northern P. R. Co. v. Dixon** [C. C. A.] 139 Fed. 737 (maxim does not apply in master and servant cases since happening of accident may come from a cause for which master is not responsible); **Shandrew v. Chicago, St. P., M. & O. R. Co.** [C. C. A.] 142 Fed. 320 (bursting of hose to

air brake); *McDonnell v. Oceanic Steam Nav. Co.* [C. A.] 143 Fed. 480 (longshoreman fell through hatch).

p. 244, n. 123. **Alabama.** Fact that plaintiff was thrown from a car which he was dumping in violation of rules is not evidence of negligence. *Redus v. Milner Coal R. Co.*, 41 So. 634. **Colorado.** Side of trench caving no inference of negligence. *City of Greeley v. Foster*, 32 Colo. 292. **Indiana.** The maxim does not apply in master and servant cases. *Southern Ind. R. Co. v. Messick*, 35 Ind. App. 676 (derailment); *Southern Ind. R. Co. v. Baker* [Ind. App.] 77 N. E. 64 (collision). Elevator fell because safety device failed to work and it was held that negligence might be inferred since both the use of the device and the duty of inspection belonged to the defendant and though the servant at the time was using the elevator he had nothing to do with the device. *National Biscuit Co. v. Wilson* [Ind. App.] 78 N. E. 251. **New York.** When a passenger or a traveler upon the highway is hurt by something under the management and control of the defendant, since the defendant is bound to use the highest degree of care, the proof of the accident, if it could happen only through abnormal causes, raises a presumption of negligence. *Edgerton v. New York R. Co.*, 39 N. Y. 227 (derailment); *Seybolt v. New York L. E. & W. R. Co.*, 95 N. Y. 568 (derailment); *Volkmar v. Manhattan R. Co.*, 134 N. Y. 419 (fall of bolt into street); *Cosulich v. Standard Oil Co.*, 122 N. Y. 118 (explosion injuring property). It must appear that the agency was in defendant's control. *Kirby v. President, etc., Delaware & H. C. Co.*, 46 N. Y. S. 777; *Id.*, 62 N. Y. S. 1110 (passenger in temporary station hurt by explo-

sion of hot water heater not owned by defendant); *Cross v. Koster*, 17 App. Div. 402; terra cotta fell where a man had been working. See *Duer v. Consolidated Gas Co.*, 83 N. Y. S. 714. "Some injuries are of such a nature that the first thought that occurs to the mind is that nothing but carelessness or willfulness could have produced them. The law adopts the same idea (*res ipsa loquitur*). Sometimes the situation is such as to suggest negligence, and the defendant alone is able or is presumed to be able, to furnish the facts." *Piehl v. Albany R.*, 80 App. Div. 166; *Id.*, 162 N. Y. 617. Blowing out fuse in electric car such a common occurrence that negligence is not predicable of it. *D'Arcy v. Westchester Elec. R. Co.*, 81 N. Y. S. 952. Where an elevator in office fell killing a person rightfully using it, the court said: "The application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant. . . . The 'res,' therefore, includes the surrounding circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these

rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions” *Griffen v. Manice*, 166 N. Y. 188. So in a case where a child waiting at a pier was hurt by the parting of the hawser by which a vessel was being warped to the wharf it was said that the maxim was not limited to cases of contractual relations only, but that the circumstances must be such as to create on the defendant’s part a duty to use care, which was not the case here. “Its operation where the relations are not of a contractual character, can only be . . . where there are actually shown such facts and circumstances, in the nature of the defendant’s undertaking and of the accident itself, from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that it should exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference.” *Duhme v. Hamburg American P. Co.* [N. Y.] 77 N. E. 386. The following cases relate to application of the maxim in master and servant cases. Plaintiff walking along track on edge of precipice and track gave way. This fact threw on defendant the burden of explanation. *Lentino v. Port Henry I. O. Co.*, 71 App. Div. 466, 75 N. Y. S. 755. Where plaintiff was injured by fall of elevator and both sides introduced evidence it was held that the fact

that accident occurred as testified to by plaintiff's witnesses did not authorize inference of negligence. *Ingram v. Fosburg*, 73 App. Div. 129, 76 N. Y. S. 344. Plaintiff crushed in defendant's elevator about which he had been instructed and there was no evidence of defects: complaint properly dismissed. *Webb v. D. O. Haynes & Co.*, 75 App. Div. 620, 78 N. Y. S. 95. Elevator fell, plaintiff testified that cause was breaking of cable and defendant showed a hidden defect in gear which plaintiff brought out was an obvious crack. Not necessary to determine whether maxim applies and it was said that where an appliance or machine obviously safe has been in daily use for a long time and has uniformly proven adequate and safe, its use may be continued without imputation of carelessness, but with this crack the elevator was not obviously safe. *Swenson v. Metropolitan St. R. Co.*, 78 App. Div. 379, 80 N. Y. S. 281. Falling Burton spar struck plaintiff. This was rigged when necessary by servants. Maxim does not apply, accident may have been due to no defect or to latent defect. *Moran v. Munson S. S. Line*, 82 App. Div. 489, 81 N. Y. S. 612. Plank fell from scaffold, no apparent cause save vibration from engine near by. Negligence could be inferred. *Iesief v. New York Cent. & H. R. R. Co.*, 102 App. Div. 168, 92 N. Y. S. 342. Bottom of elevator torn out, maxim applied. *Samuels v. McKisson*, 99 N. Y. S. 294. Portable derrick set up and moved by servants fell: maxim does not apply. *Fallon v. Mertz*, 110 App. Div. 755, 97 N. Y. S. 417. Bucket being hoisted fell. "The mere fact that an accident has happened does not give rise either to the presumption of negligence on the part of the master, as a general

proposition, nor yet to the absence of contributory negligence on the part of the deceased. These propositions must be proved affirmatively." *Skapura v. National Sugar Ref. Co.*, 83 App. Div. 21, 81 N. Y. S. 1085. Portion of floor had been removed for a long time, and the other portion fell. This was a place provided by the defendant for the plaintiff's labor and the falling of the floor made out a prima facie case. *Muhlens v. Obermeyer & Liebmann*, 83 App. Div. 88, 82 N. Y. S. 527. Temporary terra cotta arch on which plaintiff was standing gave way; held that maxim did not apply and that the rule can only be invoked, as between master and servant, if at all, where the facts not only warrant an inference of negligence but establish that the negligence was that of the master. *Haughey v. Thatcher*, 89 App. Div. 375, 85 N. Y. S. 935. Machine started, but as it was not clear that power was shut off there was no inference of negligence. *Carley v. Gair*, 93 App. Div. 614, 87 N. Y. S. 709. Plaintiff caught between projecting running boards on top of two cars: a prima facie case. *Strauss v. New York, N. H. & H. R. Co.*, 91 App. Div. 583, 87 N. Y. S. 67. Fact that handle of milk can gave way while being used by plaintiff not of itself evidence of negligence. *Schapiro v. Levy*, 101 App. Div. 444, 91 N. Y. S. 1044. Maxim does not apply where servant is injured by fall of freight elevator. *Starer v. Stern*, 100 App. Div. 393, 91 N. Y. S. 821. Board on which plaintiff was standing tipped and threw him into vat; maxim did not apply. *Dolan v. New York, S. U. Co.*, 104 App. Div. 14, 93 N. Y. S. 217. One end of scaffold tipped down throwing plaintiff off. As plaintiff may have let rope,

by which scaffold was supported, slip, the maxim did not apply. "The maxim only applies where the accident could not have happened except from defectiveness of the appliance." *Andrews v. Reiners*, 98 N. Y. S. 658. Plaintiff hurt by explosion while working on third rail system near a feed wire. He argued that explosion could not have taken place unless there had been some defect in the insulation at the point and moment of contact and that this showed negligence. "This seems to us to be an attempt unwarrantably to extend the doctrine of *res ipsa loquitur*, for it implies the drawing of an inference from the mere happening of the accident, that the defect in the insulation, which concededly must have existed at the moment of the explosion, had existed previously for a sufficient time to impute notice to the defendant. The circumstances as disclosed by the evidence warrant no such inference." *Carey v. Manhattan R. Co.*, 98 N. Y. S. 668. Fall of freight elevator caused by broken bolt. Evidence of plaintiff's witnesses showed that accident happened without negligence of defendant and, therefore, no room for maxim. *Stackpole v. Wray*, 74 App. Div. 310, 77 N. Y. S. 633; 99 App. Div. 262, 90 N. Y. S. 1045. Fall of derrick is evidence of negligence, but burden of finally proving negligence remains with plaintiff. *Gorman v. Milliken*, 42 Misc. 336, 86 N. Y. S. 699; 102 App. Div. 617, 92 N. Y. S. 1126. Where a car started without apparent cause, a thing which had happened three times before, and injured plaintiff, he contended, in the words of the court, that "the jury may find that the defendant failed in the discharge of his duty towards his employe, by omitting to provide against an

alleged defect in a machine in ordinary use, which so far no one has been able to point out," but the court held that this rule would extend unwarrantably the master's liability and was not sound; and that in the light of all the evidence the inference was as strong that one of the servants in his haste to get home had failed to shift the belt entirely off the loose pulley as it was that there was a defect in the machine and consequently the plaintiff could not recover. *Dingley v. Star Knitting Co.*, 134 N. Y. 552. Under the Labor law the breaking or fall of a scaffold is negligence. *Cummings v. Kenny*, 97 App. Div. 114, 89 N. Y. S. 579; *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. S. 203. So of a ladder. *Tierney v. Vunck*, 97 App. Div. 1, 89 N. Y. S. 612.

p. 244. It is said that the maxim should be applied with caution. "The maxim *res ipsa loquitur* is simply a rule of evidence. The general rule is that negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injury complained of, or the attendant circumstances may sometimes well warrant an inference of negligence. It is sometimes said that it warrants a presumption of negligence; but the presumption referred to is not one of law but of fact. It is, however, more correct and less confusing to refer to it as an inference rather than a presumption; and not an inference which the law draws from the fact, but an inference which the jury are authorized to draw; and not an inference which the jury are compelled to draw. . . . When it has been shown that the servant was in the exercise of due care, and the manner of the injury or the attendant circum-

stances are such that the injury could not have resulted unless the master had been negligent in some respect in which the law required him to be diligent for the servant's safety, then the jury might be authorized to infer that the master had been negligent in respect of the matter which was the basis of the suit, and would be authorized to base a finding upon such an inference, in the absence of an explanation which would be satisfactory to them; and it is not necessary that this explanation should satisfy them as to the cause of the injury, but an explanation which satisfies them simply that the master has exercised all the diligence which the law requires of him would be sufficient to rebut the inference of negligence resulting from the happening of the occurrence, although the cause thereof might still be involved in unsolvable mystery. . . . So if there is evidence that the master has fully discharged the duty which the law requires of him in reference to his servant, although he has not satisfactorily accounted for the occurrence, the inference should go for naught and the finding should be in favor of the defendant. The application of the maxim, *res ipsa loquitur*, does not change one iota of the law of master and servant, but simply affords, in some rare cases, a means of proof to which the servant may resort to carry the burden which the law imposes upon him in a case where he sues his master for negligence. In these cases which are of rare occurrence (for the maxim only applies to cases which do not ordinarily and usually happen) the maxim affords to the servant an opportunity to claim at the hands of the jury an inference drawn from facts which he may rely upon as

proof of that which the law requires him to prove. The inference is only *prima facie*, is generally slight, and is easily overcome." *Palmer Brick Co. v. Chenall*, 119 Ga. 837. Where pipe left resting on pile of dust fell through opening in floor, the maxim applied. *Huggard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475. See, also, as to application of rule in master and servant cases, *Houston v. Brush & Curtis*, 66 Vt. 331.

Section 51. Statutory Enactments.*

p. 246, n. 124. See cases cited *infra*, and *Jetter v. New York & H. R. Co.*, 2 Abb. Ct. App. 458; *Chesley v. Nantasket Beach S. S. Co.*, 179 Mass. 469.

p. 246, n. 125. In Indiana violation of statute is conclusive evidence of negligence. *Brower v. Locke*, 31 Ind. App. 353 (child of 14 cleaning machinery in violation of statute); *Indiana Mfg. Co. v. Wells*, 31 Ind. App. 460 (child of 15 hurt by revolving knives unguarded in violation of statute); *Espenlaub v. Ellis*, 34 Ind. App. 163 (unguarded saw); *Baltimore & O. S. W. R. Co. v. Cavanaugh*, 35 Ind. App. 32 (unguarded saw); *Muncie Pulp Co. v. Hacker* [Ind. App.] 76 N. E. 770 (emery wheel without dust fan); *Monteith v. Kokomo W. E. Co.*, 159 Ind. 149; *Davis v. Mercer Lumber Co.*, 164 Ind. 413 (unguarded saw); *Robertson v. Ford*, 164 Ind. 538 (belt shipper). So in Alabama. *Kansas City, M. & B. R. R. Co. v. Flipppo*, 138 Ala. 487; *Mobile, J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 258 (failure to use automatic couplers required by Congress). In New York. *Klein v. Garvey*, 94 App. Div.

* 6 Curr. Law, 547.

183, 87 N. Y. S. 998 (planer with guard improperly arranged); *McManus v. St. Regis Paper Co.*, 100 App. Div. 510, 91 N. Y. S. 1102; *Id.*, 107 App. Div. 29, 94 N. Y. S. 932 (unguarded machine). *Gorman v. McArdle*, 67 Hun, 484 (fire escape); *Pelin v. New York Cent. & H. R. R. Co.*, 102 App. Div. 71, 92 N. Y. S. 468 (over-working train crew). Where defendant complied with act of congress and used a short pilot instead of a long one on its locomotive and because of this the locomotive was upset when it struck a cow, it was held that there was no liability. *Briggs v. Chicago & N. W. R. Co.* [C. C. A.] 125 Fed. 745.

p. 247, n. 128. *Jetter v. New York & H. R. Co.*, 2 Abb. Ct. App. 458. Injury must proximately result from violation. *Mairs v. Baltimore & O. R. Co.*, 175 N. Y. 409. Pleading statute. *Knitz v. Johnson* [Ind. App.] 79 N. E. 533 (unguarded saw); *Wolf v. Smith*, 42 So. 824 (action based on statute requiring master to keep stretcher and medicine in mine. A new duty. No penalty affixed but private action will lie. Defendant's negligence not alleged). Violation of elevator statute requiring device to prevent foot being caught is evidence of negligence. *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580.

p. 247, n. 129. See Wash. Sess. Laws 1905, c. 84; Ind. Laws 1907, c. 157.

p. 248, n. 133. That statutes or ordinances requiring signals to be given at crossings do not apply to trainmen, see *Norfolk & W. R. Co. v. Gesswine* [C. C. A.] 144 Fed. 56; *Central of Ga. R. Co. v. Martin*, 138 Ala. 531. Rules of railroad commissioner regulating speed look to safety of trains and fence statutes to the pro-

tection of landowners. Violation of neither is evidence of negligence when horse left beside track is injured. *Gerry v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 783. That they do apply, see *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 78 N. E. 1033; *Chicago & E. I. R. Co. v. Lawrence* [Ind.] 79 N. E. 363.

In view of the many child-labor statutes, an important question has arisen as to the effect to be given the violation of them. The debated question is whether the mere fact of the unlawful employment of a child makes a master liable for an injury to him when the declaration counts on negligence generally and not on the statute itself. The authorities are conflicting. A master is bound at his peril to inform himself about the child before employing him: that the parents did not give the child's age correctly and so the master failed to have a school certificate is no excuse. *La Porte Carriage Co. v. Sullender* [Ind. App.] 71 N. E. 922. Or that the child falsely represented his age. *American C. & F. Co. v. Armentraut*, 214 Ill. 509. The following cases hold that the unlawful employment of a child is evidence of negligence. *Iron & Wire Co. v. Green*, 108 Tenn. 161; *E. P. Breckenridge Co. v. Reagan*, 22 Ohio Cir. Ct. R. 71; *Hickey v. Taaffe*, 32 Hun, 7; *Morris v. Stanfield*, 81 Ill. App. 264 (if the violation contributes to the injury); *Nickey v. Steuder*, 164 Ind. 189 (if violation was proximate cause and child not guilty of contributory negligence it is negligence per se. In this case another servant threw a piece of wood at child and such act was held to be an intervening cause, hence no recovery); *American C. & F. Co. v.*

Armentraut, 214 Ill. 509 (if child is hurt while doing what he is directed to do, master is liable irrespective of child's contributory negligence); Perry v. Tozer, 90 Minn. 431 (school certificate statute is for the protection of children as well as for their education and violation is evidence of negligence); Queen v. Dayton C. & I. Co., 95 Tenn. 458 (violation is negligence. "Of course we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages, simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment"). The question has recently been carefully considered in New York. A boy under 14 years of age employed in defendant's factory was hurt while cleaning a printing press which was not in motion. No evidence was offered of negligence of the defendant in regard to the machinery or in warning or instructing the plaintiff. A statute forbade the employment of a child under 14 years of age. The trial court nonsuited the plaintiff, the appellate division, 72 N. Y. S. 1118, reversed this ruling and granted a new trial, and on appeal the holding of the appellate division was affirmed. Marino v. Lehmaier, 173 N. Y. 530.

Haight, J. (with whom were Martin, Vann and Cullen, J. J.) said that the statute was a police regulation designed to protect children of tender age from injuries liable to result from their employment: that the knowl-

edge and capacity of the infant, his judgment, discretion, care, and caution, and his ability to know and appreciate the dangers that surrounded him, even prior to the adoption of the labor law, were questions of fact for the jury, "and, to our minds, the statute, in effect, declares that a child under the age specified presumably does not possess the judgment, discretion, care, and caution necessary for the engagement in such a dangerous avocation, and is, therefore, not, as a matter of law, chargeable with contributory negligence, or with having assumed the risk of the employment in such occupation. . . . Our attention, however, has been called to no statute prohibiting the doing of an act which is dangerous to the life or health of others in which it has been held that the jury may not find negligence, and a liability for damages resulting from the prohibited act, . . . at least a question of fact was presented for the determination of the jury, and, in case it should be found that the defendant was negligent, and the plaintiff under the circumstances was not chargeable with contributory negligence, the defendant was civilly liable."

Parker, C. J. (concurring). "The statute amounts to a declaration by the state that the employment of children under 14 years of age is so far neglectful of their lives and limbs as to make it the duty of the state, in the exercise of its police power, to forbid such employment, and enforce its commands by penalties. Now, while the offense against the state is only punishable by it as a misdemeanor, the violation of the statute is, as against the child whom the state deems incompetent to contract for such forbidden service, a

wrongful and negligent act, which of itself furnishes some evidence of negligence in cases where the accident could not have happened but for an employment to work in a factory . . . it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with other facts, as evidence tending to show negligence on the part of defendant."

O'Brien, J. (dissenting). "The question is whether the employment of a boy 13 years and 9 months of age is in and of itself proof of negligence in an action against the master. . . . I do not think that the mere employment of the plaintiff, although in violation of the labor law, was any proof of actionable negligence." The real question is whether it subjects the master to civil liability under the general law of negligence. The legislature did not change the rules of negligence nor create any new ground of civil liability or cause of action. "It sought to regulate the employment of labor in factories . . . but it left actions for personal injuries on the ground of negligence just where they were before. . . . It is quite obvious that the employment of a lad between 13 and 14 years of age to work around a printing press is not an act which at common law was any proof of negligence. . . . It is, doubtless, within the power of the legislature to change the law of evidence as applicable to negligence, and to prescribe that the violation of the statute shall be followed by a civil liability at the suit of the person injured, but nothing of that kind is to be found in the statute in question. A negligent act must be determined from its real character and

nature with reference to the duties imposed upon the actor by law, and is not to be predicated upon the mere violation of some statute, unless the prohibition is of an act which was negligent before the statute was passed or was some proof of negligence. . . . The legal consequences of the violation of a statute forbidding some act that, but for the statute, was perfectly lawful, do not extend beyond the statutory penalty. Hence it follows that the violation by the defendant of the labor law, while it may have subjected him to the penal consequences prescribed, did not prove or tend to prove that he thereby incurred a liability to the plaintiff on the ground of negligence."

Gray, J. (dissenting). "No affirmative act of negligence can be chargeable to the defendant . . . unless the mere violation of the statute is held to constitute such; and that, I think, is an unsound proposition. It is contrary to the ordinary rules of law in such cases, and, in my opinion, it is giving an unwarranted operation to the statute. The cause of the injury was not the employment of the boy." In *Lee v. Sterling Silk Mfg. Co.*, 93 N. Y. S. 560, it was held that unlawful employment of a child made employer liable as matter of law, that the violation was not merely some evidence of negligence, and that the *Marino Case*, 173 N. Y. 530, above cited, decides that the effect of the statute is at all events, to prevent the child's negligence or assumption of risk being held established as matter of law as could have been done before the statute. But on appeal this holding was overruled and it was said that violation of the statute was evidence but not conclusive evidence of plaintiff's or defendant's negli-

gence, 101 N. Y. S. 78. In *Regling v. Lehmaier*, 98 N. Y. S. 642, it was held that the fact of plaintiff's employment under the statutory age was evidence of negligence. *Dragotto v. Plunkett*, 99 N. Y. S. 361, proof of employment of child between 14 and 16 years of age in violation of labor law establishes presumptively that plaintiff did not possess the judgment, care, caution and discretion necessary for the business in which he was employed. *Rahn v. Standard Optical Co.*, 110 App. Div. 501, 98 N. Y. S. 1060; boy illegally employed and negligence of plaintiff and defendant for jury. *Gallenkamp v. Garvin Mach. Co.*, 91 App. Div. 141, 86 N. Y. S. 378; *Id.*, 179 N. Y. 588; boy illegally employed and his negligence for jury. To the contrary are *Evans v. American I. & T. Co.*, 42 Fed. 519; statute forbade employment of child under 12, and other negligence than mere violation must be shown. *Jacobs v. The Fuller & Hutsinpillar Co.*, 67 Ohio St. 70. "The employment of the plaintiff, when he was under sixteen years of age, was not the proximate cause of the injury, and it could not in any degree tend to show that the defendant was negligent in not giving, or causing to be given, to the plaintiff, proper instructions as to operating the machine." See, also, *White v. Wittemann Lith. Co.*, 58 Hun, 381; *Id.*, 131 N. Y. 631. It seems to the writer that, referring to the *Marino Case*, above cited, the dissenting justices have the better of the argument. When the plaintiff raises on his pleadings the issue of negligence he must, to prove his case, show a duty owed him by the defendant, a lack of due care to perform that duty and injury proximately resulting therefrom. The legislature from time

to time may vary the duties which an employer owes his servants: it may say that certain machines shall have certain guards, for example, and such a statute clearly imposes a duty to take certain precautions against injury where according to circumstances there may or may not have been one before, and if that duty is not performed by the master his failure so to perform it may well be considered lack of care. The child-labor laws seem to stand on a different footing. At common law the master could lawfully employ whom he chose but in so doing was bound to see that reasonable care was used to instruct and warn them about their work. The actual employment was neither negligent nor wrongful, and something more must have been shown, as failure to use care to instruct, before any duty was violated. Under the child-labor law the employment is wrongful but it is not on that account negligent; nor can it be considered negligent unless the statute is so construed as to impose a new duty on the master to use care toward the child and a lack of due care in performing it. The violation of the statute by its terms imposes a penalty on the master; by virtue of the rule that where a statute is passed for the benefit of a particular class a private action will lie although a penalty may also be exacted (see *supra*, n. 128) the child injured through the violation may have an action for his loss by declaring on the statute itself without reference to the law of negligence. But considering the violation to be evidence of negligence on an issue of negligence solely, is a step beyond this and can only be sound on the theory that by a true construction of the statute a new duty to use care is im-

posed. Perhaps the statute does mean that the employment of a child under 14 years of age is not proper care and imposes a duty on a master not to use employes under a certain age in his business just as he may be under a statutory duty not to use unguarded machines in his business. If that is true and a thirteen year old boy injures another servant or an unguarded machine injures a servant the master has failed in his duty in each case and evidence of the duty and its violation is evidence of his negligence. If the thirteen year old boy is himself injured then it would be true that this new duty to exercise a new kind of care imposed on the master has been carelessly or willfully neglected and that is evidence of negligence. The plaintiff's recovery depends also upon whether his injury proximately resulted from the negligence, and in the child-labor statutes it might often be the case that the unlawful employment was a condition and not a cause (*supra*, §§ 14, 15) and that some cause other than the mere employment was responsible for the injury.

The statute relating to the employment of the child may apply not only to the master but to the child himself. Thus where a Massachusetts statute provided that no one under eighteen should operate certain elevators, and the plaintiff, a boy of 15, was hurt while operating such an elevator, the defendant set up in its answer the fact that the boy misrepresented his age, that he knew of the statute and being engaged in an unlawful act could not recover. The plaintiff's demurrer to this answer was overruled, the court saying: "That the statute covers both employer and employe was not disputed at the argument." *Malloy v. Amer-*

ican, H. & L. Co. [C. C. A.] 148 Fed. 482. See, also, *Nottage v. Sawmill Phoenix*, 133 Fed. 979, 983. From the cases above cited it would seem that the child illegally employed must in order to recover be himself in the exercise of due care, in analogy to actions sounding in negligence upon breaches of other statutes, *infra*, n. 134. But see *American, C. & F. Co. v. Armentraut*, 214 Ill. 509. Whether or not the child, illegally employed, may assume the risks of the business as if there were no statute involved must depend upon the construction and purpose of the child-labor laws. If the court construes them to mean that "a child under the age specified presumably does not possess the judgment, discretion, care, and caution necessary for the engagement in such a dangerous avocation, and is, therefore, not, as a matter of law, chargeable with contributory negligence, or with having assumed the risk of the employment in such occupation," to quote from *Marino v. Lehmaier*, above cited (see, also, *Dragotto v. Plunkett*, above cited) the question of his assumption of risks inherent in the business or dangers either existing when he accepts employment or afterwards arising must always be a question of fact for the jury, though perhaps some courts may go further and hold that the doctrine of assumption of risk does not apply to such a child at all. Apparently in New York the question is for the jury, *infra*, § 116. In Massachusetts it was said: "Where the legislature has not made it unlawful to employ a certain operative upon a certain machine, the obligations of the employer and the rights of the employe must be determined by the application of the ordinary rules of law." *Cohen v. Hamblin & Russell Mfg. Co.*, 186 Mass. 544. It may well be doubted if

the legislature had such a purpose in mind in passing these laws. The intent would seem rather, by preventing the employment of young children, to raise the standard of education and improve the health and physique of the community: an intent which would not affect the existing rules of negligence or assumption of risk. See, also, *infra*, § 116.

p. 248, n. 134. See *supra*, n. 133.

p. 249, n. 137. Federal Safety Appliance Act. Scope of statute. *Johnson v. Southern Pac. R. Co.* [C. C. A.] 117 Fed. 462; *Id.*, 196 U. S. 1. *Infra*, § 116. Scope of Rev. Laws, c. 111, §§ 203, 209. *Taylor v. Boston & M. R. Co.*, 188 Mass. 390.

p. 248, n. 138. Machine unguarded in violation of statute: fact that guard was furnished but operator did not use it is no excuse. *Espenlaub v. Ellis*, 34 Ind. App. 163. Failure of servant to replace guard does not excuse master. *McManus v. St. Regis Paper Co.*, 100 App. Div. 510, 91 N. Y. S. 1102; 107 App. Div. 29, 94 N. Y. S. 932. Where plaintiff was sent to remedy a dangerous condition in a mine and was hurt by slate falling on him, it was held that the mining statute did not apply since the boss could only make the place safe by sending servants to do it. *Indiana & C. Coal Co. v. Batey*, 34 Ind. App. 16.

Section 52. Negligence of the Employer.

Section 53. Negligence of Person Intrusted.*

p. 253, n. 147. Failing to provide suitable tools or permitting them to be in a defective condition is neg-

* 6 Curr. Law, 544.

ligence of a person entrusted. Blocks of wood used to blocks wheels of car. Sloss-Sheffield S. & I. Co. v. Mobley, 139 Ala. 425.

p. 253, n. 150. American Rolling M. Co. v. Hullinger, 161 Ind. 673 (master mechanic—failing to fasten truss); Gregory v. American Thread Co., 187 Mass. 239 (second hand—failed to repair lap winder). Evidence that the attention of person entrusted was called to condition of track and he said it was out of gauge is admissible. Birmingham Trac. Co. v. Reville, 136 Ala. 335.

p. 254, n. 151. Pioneer M. & M. Co. v. Thomas, 133 Ala. 279 (plaintiff's duty to inspect roof for loose rock); Boucher v. Robeson Mills, 182 Mass. 500 (rotten belt broke; that it was plaintiff's duty to look after the belts temporarily, but he did not get round to this one until he was called upon to fix it does not charge him with negligence in not previously inspecting it or in knowing its condition). See Wood v. New York Cent. & H. R. R. Co. [N. Y.] 77 N. E. 27 (station agent fell into excavation which it was his duty to inspect).

Section 54. Court or Jury.

p. 254, n. 152. Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921.

p. 256, n. 153. Crookston Lumber Co. v. Boutin [C. C. A.] 149 Fed. 680; Libby, McNeill & Libby v. Cook [Ill.] 78 N. E. 599. Motion for nonsuit admits plaintiff's evidence and all legitimate inferences that may be drawn from it. Allen v. Florence & C. C. R. Co., 15 Colo. App. 213. Request to direct verdict made by party having burden of proof should not be

granted when verdict must be based upon the testimony of witnesses in whole or in part. Contributory negligence. *Stephens v. American C. & F. Co.* [Ind. App.] 78 N. E. 335.

p. 257, n. 156. *Melvin v. Pennsylvania Steel Co.*, 180 Mass. 196 (chisel fell on plaintiff in building); *Gregory v. American Thread Co.*, 187 Mass. 239 (machine started); *Byrne v. Boston Woven Hose & R. Co.*, 191 Mass. 40 (machine started); *Erickson v. American S. & W. Co.* [Mass.] 78 N. E. 761 (explosion of steam pipe); *Gorman v. Milliken*, 42 Misc. 336, 86 N. Y. S. 699 (fall of derrick). See *supra*, § 50.

p. 258, n. 157. *McGee v. Boston El. R. Co.*, 187 Mass. 569 (snow falling from structure on stranger); *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338 (emery wheel burst). Inference of negligence cannot be based upon a presumption or conjecture. *Leonard v. Miami Min. Co.* [C. C. A.] 148 Fed. 827. Scintilla of evidence not enough to take case to jury. *Powers v. New York Cent. & H. R. R. Co.*, 60 Hun, 19.

p. 258, n. 160. *Stenger v. Buffalo Union Furnace Co.*, 98 App. Div. 361, 90 N. Y. S. 222 (gas in furnace).

CHAPTER V.

SUPERINTENDENCE.

- § 55. Fellow-Servants.**
- 56. Effect of Clause.**
- 57. Superintendent a Servant Intrusted with Duty.**
- 58. "Superintendence."**
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Section 55. Fellow-Servants.

p. 263, n. 7. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375; order in relation to use of materials. *Hooe v. Boston & N. St. R. Co.*, 187 Mass. 67. A general manager is an alter ego. Below the grade of general manager "it is not a question of relative grade in the service, but depends entirely on the question as to whether the employe, whose negligence is complained of, is discharging one of those personal, nondelegable duties which the master must attend to himself, so that any servant charged with these duties stands in the place of the master." *Alabama, G. S. R. R. Co. v. Vail*, 142 Ala. 124. Master may delegate to a competent servant the duty of inspecting and maintaining roof of mine and such servant does not become a vice-

* 6 Curr. Law, 553.

principal. *Tutwiler, C. C. & I. Co. v. Farrington*, 34 So. 898.

p. 264, n. 7. If servant is entrusted with performance of duties personal to master, the master is answerable for his negligence without regard to his rank. *Southern Ind. R. Co. v. Hurrell*, 161 Ind. 689. Not liable for act of foreman at common law unless he was performing master's duty. Giving orders not necessarily master's duty. *Dill v. Marmon*, 164 Ind. 507 (overruling *Columbus & I. C. R. v. Arnold*, 31 Ind. 174, which held that a master mechanic of railway was not a vice-principal.) Giving of warning to repair men, a duty which cannot be delegated. *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198.

p. 264, n. 7. In New York all who serve a common master are fellow-servants without regard to their rank in the service or whether they are in different departments or not. *Crispin v. Babbitt*, 81 N. Y. 516 (general manager); *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622. See *Pantzar v. Tilly Foster T. M. Co.*, 99 N. Y. 368 (general manager). But if a servant is charged with the performance of duties personal to the master is he a vice-principal for whose negligence the master is answerable. The test is the character of the act. *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Loughlin v. State*, 105 N. Y. 159; *Hankins v. New York L. E. & W. R. Co.*, 142 N. Y. 416; *Crispin v. Babbitt*, 81 N. Y. 516; *Ford v. Lake Shore & M. S. R. Co.*, 124 N. Y. 493. The executive details of the work may be delegated to competent servants and in carrying out such details the master is not answerable for their negligence.

Hassey v. Coger, 112 N. Y. 614. Thus the small changes or repairs arising in the daily operation of a machine may be left to servants. Cregan v. Marston, 126 N. Y. 568; Loughlin v. Brassil [N. Y.] 79 N. E. 854. Examples of details of work properly left to servants are: Removal of snow or ice from track, Neagle v. Syracuse B. & N. Y. R. Co., 185 N. Y. 270. Renewing rope from supply on hand, Kelly v. Hogan, 37 Misc. 761, 76 N. Y. S. 913. Method of moving weight, Flet v. Hunter Arms Co., 74 App. Div. 572, 77 N. Y. S. 752. Closing door in mill, Peet v. H. Remington & Son, P. & P. Co., 86 App. Div. 101, 83 N. Y. S. 524. Neglect of servant stationed to warn of approach of car. Ryan v. Third Ave. R. Co., 92 App. Div. 306, 86 N. Y. S. 1070; McAuley v. New York Cent. & H. R. R. Co., 111 App. Div. 117, 97 N. Y. S. 631. Neglect to make proper use of proper materials. O'Connell v. Thompson-Starrett Co., 72 App. Div. 47, 76 N. Y. S. 296. Otherwise when engineer fails to procure chimney for headlight. Sutter v. New York Cent. & H. R. R. Co., 79 N. Y. S. 1106, 79 App. Div. 362. Foreman failed to warn of blast. "The effort to divide up the duties of the defendant's foreman, and to hold that in superintending the drilling of the holes, in filling them with powder or dynamite, and in preparing the blast and discharging the same, he was to be regarded as a fellow-servant, while in the matter of giving warning he was to be regarded as the alter ego of the defendants, is a refinement of the rules of negligence which has not yet been sanctioned by the appellate courts of this state." The giving of warning was merely an incident of the work. The rule as to

safe place does not mean that defendant shall be responsible for neglect of competent employe. *Ward v. Naughton*, 74 App. Div. 68, 77 N. Y. S. 344; *Riola v. New York Cent. & H. R. R. Co.*, 97 App. Div. 252, 89 N. Y. S. 945; *Id.*, 184 N. Y. 96. See *infra*, § 110, n. 98. Compare *Hooe v. Boston & N. St. R. Co.*, 187 Mass. 67. The duty of inspection cannot be delegated but the scope of this rule depends on nature of work and manner of its conduct. *Franck v. American Tartar Co.*, 91 App. Div. 571, 87 N. Y. S. 219. General superintendent observing man tamping dynamite with steel rod and not interfering, charges master with his negligence. This is not a detail of the work. *O'Brien v. Buffalo Furnace Co.* [N. Y.] 76 N. E. 161. Duty of instructing unskilled man cannot be delegated. *Tivnan v. Keakon*, 101 N. Y. S. 1076.

p. 264, n. 8. Servants working in different departments are nevertheless fellow-servants. *Molique v. Iowa, G. M. & M. Co.*, 18 Colo. App. 223. Servant performing master's duty is not a fellow-servant. *McKean v. Colorado F. & I. Co.*, 18 Colo. App. 285. Car inspector is, therefore, not a fellow-servant. *Roche v. Denver & R. G. R. Co.*, 19 Colo. App. 204. Pumpman laying a pipe and failing to brace it is not a fellow-servant. *The Carleton M. M. Co. v. Ryan*, 29 Colo. 401. So man in full charge of timbering in mine is in charge of a separate department and is not a fellow-servant. *Cripple Creek Min. Co. v. Brabant*, 87 Pac. 794.

p. 265, n. 9. Test of fellow-servants is nature of the act, whether it be that of a servant or of a delegate of the master. *Weeks v. Scharer* [C. C. A.] 111 Fed.

330. Mere foreman or gang boss is a fellow-servant unless he is performing an absolute duty of the master. *Baltimore & O. R. Co. v. Brown* [C. C. A.] 146 Fed. 24. Duty of giving warning to servant put in dangerous place cannot be delegated. *Western Elec. Co. v. Hanselman* [C. C. A.] 136 Fed. 564. Negligence of telegraph operator and of station agent causing death of fireman is negligence of fellow-servants. *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, dissenting opinion reviews cases. On fellow-servant rule in U. S. courts see 2 Mich. L. Rev. 79, 36 Chicago Leg. News 110. The doctrine of fellow-servants does not exist in Mexico. *Mexican Cent. R. Co. v. Knox* [C. C. A.] 114 Fed. 73; *Mexican Cent. R. Co. v. Sprague* [C. C. A.] 114 Fed. 544. See Pennsylvania Act of June 10, 1907, in Appendix and New York Laws 1906, c. 657.

Section 56. Effect of Clause.*

p. 265, n. 10. New York Laws 1902, c. 600, § 1.
“2. By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer.”

p. 266, n. 11. Effect of act is to take from master the defense of common employment when injury results from negligence of a superintendent. *Bellegarde v. Union B. & P. Co.*, 90 App. Div. 577, 86 N. Y. S. 72, Id., 181 N. Y. 519; *Rosin v. Lidgerwood Mfg. Co.*, 89

* 6 Curr. Law, 562.

App. Div. 245, 86 N. Y. S. 49; *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, 94 N. Y. S. 942; *Braunberg v. Solomon*, 102 App. Div. 330, 92 N. Y. S. 506.

p. 267, n. 14. Compare *Cullen v. Norton*, 126 N. Y. 1.

p. 267, n. 15. Common-law remedies not affected. *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49.

p. 268, n. 16. *McDonnell v. Oceanic Steam Nav. Co.* [C. C. A.] 143 Fed. 480.

Section 57. Superintendent a Servant Intrusted with Duty.*

p. 268, n. 19. New York adopts the Massachusetts phrase.

p. 269, n. 20. Where superintendent appointed a man to oversee the using of blocks to tip up cars, it was held that the negligence was that of a fellow-servant, as the superintendent had no authority to delegate his duty to another. *Boyd v. Indian Head Mills*, 131 Ala. 356. Where defendant assented to foreman taking general superintendent's place in carrying out a certain work, it is liable for his negligence. *Faith v. New York Cent. & H. R. R. Co.* [N. Y.] 77 N. E. 1186. See, also, *McHugh v. Manhattan R. Co.*, 179 N. Y. 378 (clerk taking train dispatcher's place).

p. 269, n. 21. New York has the same provision. See *McHugh v. Manhattan R. Co.*, 179 N. Y. 378; *Faith v. New York Cent. & H. R. R. Co.* [N. Y.] 77 N. E. 1186.

* 6 Curr. Law, 562.

p. 269, n. 22. See *Boyd v. Indian Head Mills*, 131 Ala. 356, above cited.

p. 271, n. 25. *Southern C. & F. Co. v. Bartlett*, 137 Ala. 234 (pleading). Boss told plaintiff to cross on a temporary bridge of planks which broke. There was nothing to show that even if "boss" were a superintendent he had anything to do with the planks. *Morris v. Walworth Mfg. Co.*, 181 Mass. 326. Box slipped from shelf on saleswoman in store; it did not appear that superintendent had any duty in regard to construction or repairs of shelf or that he set plaintiff at work there. *Hofmann v. R. H. White Co.*, 186 Mass. 47. Superintendent carrying ladle of hot slag, which was no part of his duty, dropped some on plaintiff's foot. *Smith v. Pioneer Min. & Mfg. Co.*, 41 So. 475.

Section 58. "Superintendence."*

p. 273, n. 26. Engineer operating an engine which moves a steam shovel and who controls the movements of the shovel is not a superintendent. *Freeman v. Sloss-Sheffield S. & I. Co.*, 137 Ala. 481.

Section 59. "Any Superintendence."

p. 274, n. 30. Having charge of work and men and at the time exercising superintendence is evidence that servant is a superintendent. *Postal Tel. C. Co. v. Hulsey*, 132 Ala. 444. One in charge of a gang of men breaking ore is a superintendent; and one in charge of all the servants operating a blast furnace at night

* 6 Curr. Law, 562.

is a superintendent. *Williamson Iron Co. v. McQueen*, 40 So. 306.

Section 60. "Sole or Principal Duty."*

p. 274. New York uses the words "sole or principal" duty.

p. 275, n. 31. A conductor who under rules of road has no discretion but to obey orders is not a superintendent under New York statute. *Crosby v. Lehigh Valley R. Co.* [C. C. A.] 137 Fed. 765. A section foreman in charge of gang of five men unloading the cars designated by him and who also checks freight may be found to be a superintendent. *Murphy v. New York N. H. & H. R. Co.*, 187 Mass. 18. One told by general superintendent to take in a load of lumber and who accordingly selects four or five men to do it and directs them may be a superintendent. *Sampson v. Holbrook* [Mass.] 78 N. E. 127. One of a gang of four linemen who gets same wages and does same work but because of his greater experience is put in charge of the others and gives directions is not a superintendent. *Mulligan v. McCaffrey*, 182 Mass. 420. A servant directed the plaintiff how to operate his electric crane by giving signals when crane was to be moved. Held not to be a superintendent. "It was not intended that every employe who should, for the moment, have direction of work or of laborers, should be considered a superintendent within the meaning of the law. . . . It is not simply the power to instruct, or even to direct in a particular manner, that

* 6 Curr. Law, 562.

constitutes superintendence within the meaning of the law, but it must be such a supervision and charge as gives power of direction; and it must be with authority to direct the manner and means of prosecuting the work in charge. It is not sufficient to show that a man directed another as to the time when it was necessary to operate a crane, or that he even directed a number of men with reference to unimportant details of their labor, but the proof should go further. It should show that a man was vested with some power or discretion to exercise authority beyond the narrow limits of one acting under a special direction. . . . He cannot for the moment leave his duty of superintendence and act upon his own volition, and not within the scope of any act of superintendence for the benefit of the master, and create a liability against the master and in favor of a co-employee." Spring and Hiscock J. J. (dissenting) thought the negligent servant a superintendent as he did no actual work and gave orders to forty or fifty men in his room.

p. 276, n. 34. Though the whole undertaking was in charge of one person yet a subforeman who was in charge of a particular portion of the work and did no work himself was a superintendent. *Pierce v. Arnold Print Wks.*, 182 Mass. 260. A foreman may be a superintendent under the act though there is a general manager or one in general charge. *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287; *McBride v. New York Tunnel Co.*, 101 App. Div. 448, 92 N. Y. S. 282; *Carlson v. United E. & C. Co.*, 98 N. Y. S. 1036.

p. 276, n. 37. One known as "foreman" and who gives orders may be found a superintendent. *Randall*

v. Holbrook Cabot & Daly Const. Co., 95 App. Div. 336, 88 N. Y. S. 681.

p. 276, n. 38. One of gang of four linemen paid the same and doing the same work but through his experience placed in charge. *Mulligan v. McCaffrey*, 182 Mass. 420. Powder man who charged and exploded holes and sometimes inspected not a superintendent. *Hooe v. Boston & N. St. R. Co.*, 187 Mass. 67; *Byrne v. Farnum*, 188 Mass. 219. Street car conductor not a superintendent. *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. 134, 91 N. Y. S. 883. Signal man at derrick not a superintendent. *Carr v. Shields*, 125 Fed. 827. A "pusher" who is head of a gang of four or six men in structural iron work, doing the same work and without power of direction over the work but who has the duty of seeing that the rest of his gang keep busy to secure greater efficiency and who, therefore, receives a little more pay is not a superintendent. *Abrahamson v. General Supp. & Const. Co.*, 98 N. Y. S. 596; *Steamfitter. McConnell v. Morse I. W. Co.*, 187 N. Y. 341.

p. 277, n. 40. Superintendent in charge of constructing staging sometimes worked and had worked on the staging which fell. *Solari v. Clark*, 187 Mass. 229. The "boss" of one of four derrick gangs received orders from man in charge of a quarry as to what stone was wanted then marked it and got it out; he looked after his gang but when not engaged in actual supervision he worked like the rest with hammer and drill though while so at work he still kept looking after the men. The court held him a superintendent. The Massachusetts cases hold that "when

an employe works with his hands the greater portion of the time, he cannot superintend within the purview of the statute; but they do not compel us to the conclusion that this rule is absolute, and to be applied without qualification under exceptional circumstances. When . . . the alleged superintendent is only 'a mere laborer in charge of a gang,' this general rule might well be applied, if not as a rule of law, at least as a rule of presumption of fact so forcible that the court would not allow the jury to disregard it. To go further, however, than to state it ordinarily as illustration for the guidance of juries, would give an artificial construction to a statute which seems, simple, plain on its face, and reasonable in its purpose; and it would also hold that the court could assume to know that a man cannot work constantly with his hands, and yet exercise superintendence in such manner that it is his principal duty. Such an assumption would be so forced as to exclude the possibility, which the common mind knows to exist,—that not only may an employe be engaged at all times in labor with his hands, and yet exercise superintendence under such circumstances that that is his principal duty, but that, also, he may be so engaged under such peculiar circumstances that quite continuous laboring with his hands is a necessary part of the duty of superintendence." *Canney v. Walkeine* [C. C. A.] 113 Fed. 66.

p. 277, n. 41. Foreman in charge of blocking up pipe, often present, gave orders, hired and discharged men and the manual labor he performed was to show others how to work. Held, a superintendent. *Pierce v. Arnold Print Wks.*, 182 Mass. 260. Quarry foreman

who directed men, sometimes discharged them, marked where drilling was to be done but never drilled himself is a superintendent. *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287. Yard master who directed the moving of cars and gave orders to switching crews is a superintendent. *Brady v. New York, N. H. & H. R. Co.*, 184 Mass. 225. Section foreman whose gang unloaded cars and he checked freight is a superintendent. *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18. Man who looked after work, gave orders, had charge of men like a foreman, inspected the work and looked after men to see if they did the work right, sometimes "set" machines and did "a little of everything" is a superintendent. *Peterson v. Morgan Spring Co.*, 189 Mass. 576. Man directing gang unloading lumber is a superintendent. *Sampson v. Holbrook* [Mass.] 78 N. E. 127. Second hand in room may be a superintendent. *Baggeski v. Mills* [Mass.] 78 N. E. 852. Foreman whose duties were to direct drillers where to drill, to order blaster to load and who directed the men on the job and could discharge them though he set off the blasts himself is a superintendent. *McBride v. New York Tunnel Co.*, 101 App. Div. 448, 92 N. Y. S. 282. Foreman who employed men had other foremen under him whose duty was to rig the carpenter work and everything around the work and who took this particular job in hand is a superintendent. *Carlson v. United Eng. & C. Co.*, 98 N. Y. S. 1036. Train dispatcher whose duty is to watch the coupling of a fresh engine to an elevated train and when this is done to signal the conductor to start is a superintendent, and his clerk substituting

for him with master's assent is also a superintendent. *McHugh v. Manhattan R. Co.*, 179 N. Y. 378. Man called foreman who gave orders and superintended job as fully as general superintendent could have done had he been present is a superintendent. *Faith v. New York Cent. & H. R. R. Co.* [N. Y.] 77 N. E. 1086.

p. 277, n. 42. *Hourigan v. Boston El. R. Co.* [Mass.] 79 N. E. 738.

p. 278, n. 44. *Hourigan v. Boston El. R. Co.* [Mass.] 79 N. E. 738.

p. 278, n. 47. *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18 (section foreman); *Canney v. Walkeine* [C. C. A.] 113 Fed. 66 (derrick gang foreman).

Section 61. Need Not Superintend Plaintiff.*

p. 280, n. 48. *Williamson Iron Co. v. McQueen*, 40 So. 306.

Section 62. While in Exercise of Superintendence.*

p. 281, n. 51. New York has same provision as Massachusetts. Superintendent pinched or tickled workman. *Western R. of Ala. v. Milligan*, 135 Ala. 205. Superintendent carrying ladle of hot slag which was no part of his duty spilt some on plaintiff. *Smith v. Pioneer Min. & Mfg. Co.*, 41 So. 475. Superintendent holding foot of ladder let it slip. *Hoffman v. Holt*, 186 Mass. 572; *Korber v. J. Ottman Silk Co.*, 97 N. Y. S. 1044. Superintendent placed ladder and told plaintiff to go up: the act was not one of superintending but of slight assistance. *McDonnell v. New York, N. H. & H. R. Co.* [Mass.] 78 N. E. 548. Fore-

* 6 Curr. Law, 562.

man temporarily operating hoisting engine which was no part of his duty. *Randall v. Holbrook Cabot & Daly Const. Co.*, 95 App. Div. 336, 88 N. Y. S. 681. Superintendent helping workmen to build fire to thaw material was dragging tie across railroad track when it was struck by train and thrown against plaintiff. This was "not an act of superintendence, but was the act of a co-employee, for which the defendant is not liable. Liability for negligence in superintending is what is created by the statute, and not for the negligent act of a superintendent in no manner connected with his duties as such." *Bannon v. New York Cent. & H. R. R. Co.*, 98 N. Y. S. 770. Superintendent directed movement of electric crane and, when the operator left the crane, apparently turned on current so that operator was injured. A majority of the court, following *Cashman v. Chase*, 156 Mass. 342, held that this was not an act of superintendence. *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, 94 N. Y. S. 942. Superintendent helping men disentangle belt directed plaintiff to get over shaft, and then cut belt whereby plaintiff was caught. Held not an act of superintendence. Dissenting opinion. *Guilmartin v. Solvay Process Co.*, 101 N. Y. S. 118, Rev. 189, N. Y. 490.

p. 282, n. 52. In absence of one of the men, superintendent helped gang to dry out trough into which molten metal was to be poured and while carrying a ladle of hot slag dropped some on plaintiff's foot. He was not exercising superintendence and such work was not part of his duty. *Smith v. Pioneer Min. & Mfg. Co.*, 41 So. 475.

p. 283, n. 53. Superintendent gave order to plain-

tiff. While plaintiff was executing it superintendent pinched or pushed him and servant being nervous or ticklish stuck his hand in machine. Not an act of superintendence. The act must itself be an act of superintendence to fix liability and not something merely done by superintendent while in the exercise of superintendence. *Western R. of Ala. v. Milligan*, 135 Ala. 205.

p. 283, n. 55. *Green v. Smith*, 169 Mass. 485, cited n. 57 belongs here. Workmen attempted to move an iron bar on too small a truck which they had selected. It stuck in depression in floor and superintendent coming along instead of sending for a suitable truck used a board as a lever and tried to pry wheel up, whereupon handle of truck swung round on plaintiff. It was held as much an act of superintendence to adopt appliances selected by servants as if superintendent had supervised the work from the beginning. His act in prying out the wheel was not manual labor. "When he had decided to make no change, but to proceed, his use of the lever was not an independent act of work with his hands, but a part of the plan, or one of the conditions connected with his superintendence, and the moment of time taken for its performance cannot be singled out for the purpose of saying that he was at that instant a common laborer, although immediately before and after that he was clothed with the authority of his superior position." *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586. Plaintiff had stopped his machine and gone to floor above to tighten certain cylinders. Superintendent seeing machine stopped started it with his

own hand. This was held to be an act of superintendence. "The negligence, if there was any, did not consist in the mechanical details of carrying out a proper order; it consisted in setting the machine in motion at that time. If the superintendent had told another workman to start it up, probably the case would not be here. It is true, perhaps, that that could not be accepted as a universal test, because often the negligence is due to the consciousness of the party not having been directed to the point of complaint, which the hypothesis of a direction assumes it to have been. But the test seems to be of use when, as here, the precise object of the superintendent's conception was improper. In such a case the proximity between the brain that conceived and the subordinate ganglion that carried out the thought seems not to be a ground of exoneration. Supposing the order to have been given, it would have been of sufficient importance and would have risen enough above merely mechanical execution of the work that might have come from any workman to be matter of superintendence. Indeed one might say shortly that except as superintendent Royce had no business to meddle with the machine." *Roche v. Lowell Bleachery*, 181 Mass. 480. Distinguished in *Smith v. Pioneer Min. & Mfg. Co.*, 41 So. 475; superintendent carrying hot slag. Spilt some on plaintiff. The man in charge of the work of raising trusses to support a bridge also ran the hoisting engine. A truss got jammed and he sent the plaintiff upon it to clear it; while he was there the man started the engine and caused the rope holding the truss to break. Held the act of starting the engine was an act

of superintendence. "The negligence, if there was negligence in starting the engine, consisted in causing the engine to be started at all under the circumstances then existing, namely, when the truss was jammed against the wall, and when something had to give way if the engine was set in motion then. This is not a case where it was proper to start the engine, and there was negligence in the way in which the starting of the engine was carried into effect. In the former case, the decision that the engine shall be started is an act of superintendence, and it is none the less so because the manual work of setting the engine in motion is done by the superintendent. The cases of *O'Brien v. Look*, 171 Mass. 36; *Roche v. Lowell Bleachery*, 181 Mass. 480; *Meagher v. Crawford Laundry Co.*, 187 Mass. 586, are cases belonging to this class. In the latter case the act of negligence is in the way the engine is set in motion it being proper to set it in motion at the time. That is not an act of superintendence, but is the act of a fellow-servant, and for that the master is not liable at common law or under the employers' liability act. The cases of *Cashman v. Chase*, 156 Mass. 342; *Riou v. Rockport Granite Co.*, 171 Mass. 162; *Flynn v. Boston Elec. Light Co.*, 171 Mass. 395; *Joseph v. Whitney Co.*, 177 Mass. 176; *Hoffman v. Holt*, 186 Mass. 572, are cases belonging to this class. It was held in *Whittaker v. Bent*, 167 Mass. 588, that when the superintendent in that case said "go ahead," those words were said in the course of his work as a fellow-servant, and not as a direction given by him as a superintendent, and for that reason that case comes within this class. *Brittain v. West End Street Rail-*

way, 168 Mass. 10, was held to come within this class." *McPhee v. New England Struct. Co.*, 188 Mass. 141. Where ladder fell because improperly fastened at top the negligence was not in the superintendent's tying the rope but in selecting an improper rope to use. *Hourigan v. Boston El. R. Co.* [Mass.] 79 N. E. 738. Where a train dispatcher was considered a superintendent it was held that his giving a signal for train to start before the plaintiff had made a coupling was an act of superintendence. *McHugh v. Manhattan R. Co.*, 179 N. Y. 378. Foreman who directed where to drill holes and who directed a blaster to load is acting as a superintendent when he sets off a blast himself. *McBride v. New York Tunnel Co.*, 101 App. Div. 448, 92 N. Y. S. 282. A superintendent helping his men to disentangle a belt told plaintiff to get over the shaft and while plaintiff was doing so the superintendent cut the belt and plaintiff was caught. Held not an act of superintendence. Dissenting opinion. *Guilmartin v. Solvay Process Co.*, 101 N. Y. S. 118, Rev. 189 N. Y. 490.

p. 284, n. 57. *Peterson v. Morgan Spring Co.*, 189 Mass. 576. Plaintiff asked superintendent to "set" his machine and superintendent replied, "Haven't you been here long enough to set it? You ought to be able to set your own machine" whereupon plaintiff attempted to set his machine and through his inexperience was injured. Jury might find that these words were an order to plaintiff to set his own machine.

p. 284. Perhaps the rules as to acts of superintendence, arising chiefly from the Massachusetts cases may be thus summarized: Where the superintendent devises a plan or method of doing the work, or adopts the

machinery, appliances, or methods selected in the first instance by servants, or where he permits a certain condition of things to exist, so that it is probable that some act of manual labor done in the execution or in connection with such plan or condition or with such instrumentalities will cause injury, then the superintendent is guilty of negligent superintendence and the defendant is liable whether the manual work or detail which is the immediate cause of the injury is done by a servant or by the superintendent himself and whether such manual work is in itself careless or not. See *McCauley v. Norcross*, 155 Mass. 584; *Malcolm v. Fuller*, 152 Mass. 160; *Crowley v. Cutting*, 165 Mass. 436; *Green v. Smith*, 169 Mass. 485; *O'Brien v. Look*, 171 Mass. 36; *McCabe v. Shields*, 175 Mass. 438; *Meagher v. Crawford L. Co.*, 187 Mass. 586; *McPhee v. New Eng. Struct. Co.*, 188 Mass. 141; *Hourigan v. Boston El. R. Co.* [Mass.] 79 N. E. 738.

Where the superintendent himself does an act of manual labor which it was within the scope of his authority to order a servant to do and the conditions are such that had he given the order it would have been a negligent order, then the fact that he gave no order but did the manual act himself is negligent superintendence and the master is responsible whether the manual act is in itself careless or not. *Roche v. Lowell Bleachery*, 181 Mass. 480; *Osborne v. Jackson*, 110 Q. B. Div. 619; *McHugh v. Manhattan R. Co.*, 179 N. Y. 378; *McBride v. New York Tunnel Co.*, 101 App. Div. 448, 92 N. Y. S. 282. Compare *McDonnell v. New York, N. H. & H. R. Co.* [Mass.] 78 N. E. 548. Many of the cases cited in the last paragraph could also fall

in this class. It would seem that the case of *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, 94 N. Y. S. 942, should fall in this class but the ruling of a majority of the court was otherwise.

Where the superintendent himself does an act of manual labor which it was within the scope of his authority to order a servant to do and the conditions are such that had he given the order it would not have been a negligent order but the accident was caused because the manual labor was carelessly done then there is no negligent superintendence and the master is not responsible. *Cashman v. Chase*, 156 Mass. 342; *O'Keefe v. Brownell*, 156 Mass. 133; *Brittain v. West End St. R. Co.*, 168 Mass. 10; *Riou v. Rockport Granite Co.*, 171 Mass. 162; *Flynn v. Boston Elec. Light Co.*, 171 Mass. 395; *Fleming v. Elston*, 171 Mass. 187; *Hoffman v. Holt*, 186 Mass. 572; *Smith v. Pioneer Min. & Mfg. Co.*, 41 So. 475; *Randall v. Holbrook Cabot & Daly Const. Co.*, 95 App. Div. 336; 88 N. Y. S. 681; *Bannon v. New York Cent. & H. R. R. Co.*, 98 N. Y. S. 770.

Where the careless act of manual labor done by the superintendent himself is not separable from a proper act of superintendence there seems to be no liability. See *Joseph v. George C. Whitney Co.*, 177 Mass. 176; a case of its own class discussed, *infra*.

Where the act of manual labor causing the injury is carelessly done by a superintendent and such act lies beyond the scope of his authority as superintendent to order, it is not an act of superintendence and there is no liability. *Western R. of Ala. v. Milligan*, 135 Ala. 205.

p. 286, n. 59. "It is well understood that an em-
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ployer is not liable for every act done by a person engaged in superintendence, even if done to help in carrying out an order which the latter himself has given, and that different minds may differ as to where the line shall be drawn," citing *Joseph v. George C. Whitney Co.*, *supra*. *Roche v. Lowell Bleachery*, 181 Mass. 484.

Section 63. Negligence of Superintendent.*

p. 289, n. 60. *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App. Div. 366, 94 N. Y. S. 241 (iron plates placed in upright position fell).

p. 289, n. 61. *Coosa Mfg. Co. v. Williams*, 133 Ala. 606 (superintendent could not have anticipated that belt raised by pole would wrap round shaft).

p. 290, n. 65. *Slattery v. Walker & Pratt Mfg. Co.*, 179 Mass. 307 (substituting a smaller check valve on hoist); *Pierce v. Arnold Print Wks.*, 182 Mass. 260 (defective chain); *Boucher v. Robeson Mills*, 182 Mass. 500 (using up old belts before taking new ones); *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 250 (staging); *Martin v. Merchants & Min. Tran. Co.*, 185 Mass. 487 (using defective hook); *Meagher v. Crawford Laundry Co.*, 187 Mass. 568 (using too small a truck which servants had chosen); *Solari v. Clark*, 187 Mass. 229 (that staging is properly built); *Rapson v. Leighton*, 187 Mass. 432 (using defective ledger board); *White v. Wm. H. Perry Co.*, 190 Mass. 99 (building platform); *Bellegarde v. Union B. & P. Co.*, 41 Misc. 106, 83 N. Y. S. 825; *Id.*, 90 App. Div. 577, 86 N. Y. S. 72; *Id.*, 181 N. Y. 519 (failing to use guy rope

*6 Curr. Law, 562.

on derrick); *Braunberg v. Solomon*, 102 App. Div. 330, 92 N. Y. S. 506 (putting machine on improper table); *Harris v. Baltimore M. & El. Wks.*, 98 N. Y. S. 440, 112 App. Div. 903; *Id.*, 188 N. Y. 141 (defective elevator cables); *Louisville & N. R. Co. v. Jones*, 130 Ala. 456 (using jack screws to raise car); *Davis v. Kornman*, 141 Ala. 479 (using improper fasteners on planer); *Hayward v. Key* [C. C. A.] 138 Fed. 34 (defective pneumatic tool, N. Y. statute).

p. 290, n. 66. *Langley v. Wheelock*, 181 Mass. 474 (piling bars in too narrow place); *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287 (stone improperly placed); *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155 (rivets falling); *Cunningham v. Atlas Tack Co.*, 187 Mass. 51 (loading machinery); *Greenstein v. Chick*, 187 Mass. 157 (power starting on machine while plaintiff removing belt); *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18 (placing brow on car); *Nye v. Dutton*, 187 Mass. 549 (repairing defect); *Baggniski v. Mills* [Mass.] 78 N. E. 852 (moving part of machine without warning operator); *Faith v. New York, Cent. & H. R. R. Co.* [N. Y.] 77 N. E. 1186 (front of locomotive boiler fell on plaintiff); *Alabama Min. R. Co. v. Marcus*, 128 Ala. 355 (running hand car at high speed); *Virginia B. & I. Co. v. Jordan*, 143 Ala. 603 (stringer of bridge unsafe); *Williamson Iron Co. v. McQueen*, 40 So. 306 (too large lumps of ore placed in blast furnace); *Herren v. Tuscaloosa W. Wks. Co.*, 131 Ala. 81, 40 So. 55 (obstruction left on stairs); *Rick v. Saginaw Bay Towing Co.* [Mich.] 93 N. W. 632 (Canadian statute; swinging staging).

p. 291, n. 67. See cases cited *supra*, nn. 55, 56, 57.

p. 291, n. 70. "There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon on the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights, or remedies of mankind." *American Bridge Co. v. Seeds* [C. C. A.] 144 Fed. 605. *Fay v. Wilmarth*, 183 Mass. 71 (servants may fasten ladder and place hammer so they will not fall); *Thompson v. City of Worcester*, 184 Mass. 354 (servants may be trusted to select proper materials for staging); *Morrison v. Whittier Mach. Co.*, 184 Mass. 39, servant selected rope from wet floor. It was not negligence of superintendent that he did not prevent servants from leaving ropes on the floor or that he did not help select them. "So close an oversight and control of workmen by a superintendent is not necessary and would not be practicable, and is not required by due care." *Beatty v. Weed*, 186 Mass. 99 (having given proper directions superintendent went to dinner and servant knocked out pier from building and injured plaintiff. Court); *White v. Unwin*, 188 Mass. 490 (could trust carpenters to move staging); *Desautels v. Cloutier*, 189 Mass. 349 (ordering servant to throw ice pick over partition may assume it will be thrown properly); *Cahill v. Boston & M. R. Co.*, 190 Mass. 421 (pile of bales fell when servant removed skid from front); *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622 (not expecting plaintiff to walk on track when there was a safe way, superintendent

did not warn of approaching train); *Huggins v. Southern R. Co.*, 41 So. 856 (order to couple cars did not mean plaintiff must go between cars when rule forbade it).

p. 291, n. 71. *Byrne v. Leonard*, 191 Mass. 269 (how to operate machine); *Alabama S. & W. Co. v. Wrenn*, 136 Ala. 475 (moving casting); *Moss v. Mosley*, 41 So. 1012 (setting child to clean machine).

p. 291, n. 72. *Tanner v. New York, N. H. & H. R. Co.*, 180 Mass. 572 (need not warn of decayed pole); *Nordquist v. Fuller*, 182 Mass. 411 (loading of chain a detail properly left to servants); *Rafferty v. Nawn*, 182 Mass. 503 (undermining bank of earth); *Buston v. Harvard Brewing Co.*, 183 Mass. 438 (need not warn to keep hand out of gears); *Brady v. New York, N. H. & H. R. Co.*, 184 Mass. 225 (yardmaster moved cars on repairer without warning); *Nye v. Dutton*, 187 Mass. 549 (need not warn of repairs on elevator); *O'Keefe v. John P. Squire Co.*, 188 Mass. 210 (need not warn of defects in place being made safe); *Vecchioni v. New York Cent. & H. R. R. Co.*, 191 Mass. 9 (warning of approach of train); *Duffy v. New York, N. H. & H. R. Co.* [Mass.] 77 N. E. 1031 (liability of locomotive wheels to roll down on track); *Dunphy v. Boston El. R. Co.* [Mass.] 78 N. E. 479 (warning of approaching train); *Robinson Min. Co. v. Tolbert*, 132 Ala. 462 (warning of dynamite in rock); *Postal Tel. C. Co. v. Hulsey*, 132 Ala. 444, second trial see p. 292; *Roytio v. Litchfield* [C. C. A.] 113 Fed. 240 (overhanging rock in quarry).

p. 292, n. 74. *Nordquist v. Fuller*, 182 Mass. 411
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(servants overloading chain in superintendent's absence); *Rafferty v. Nawn*, 182 Mass. 503 (superintendent should have given warning but going away without providing for it, is negligence); *Beatty v. Weed*, 186 Mass. 99 (superintendent went to dinner after leaving directions and servant improperly knocked out a pier); *Sloss-Sheffield S. & I. Co. v. Holloway*, 40 So. 211 (superintendent having selected proper men and materials and having given instructions failed to oversee the building of a scaffold and was, therefore, negligent).

p. 292, n. 75. *Peterson v. Morgan Spring Co.*, 189 Mass. 576 (ordering inexperienced servant to "set" machine); *Desautels v. Cloutier*, 189 Mass. 349 (ordered servant to throw ice pick over partition may assume that it will be thrown carefully); *Feeney v. York Mfg. Co.*, 189 Mass. 336 (sending servant on unsafe staging); *Bamford v. G. H. Hammond Co.*, 191 Mass. 479 (ordered run hoisted by winch, may assume servant will do it carefully); *Southern C. & F. Co. v. Bartlett*, 137 Ala. 234 (ordering bolts taken from pulley which then fell); *Di Stefano v. Peekskill L. R. Co.*, 107 App. Div. 293, 95 N. Y. S. 179 (dynamite in stone exploded by hammer); *Berthelson v. Gabler*, 111 App. Div. 142, 97 N. Y. S. 421 (removing pier causing scaffold to fall); *Carlson v. United Engin. & C. Co.*, 98 N. Y. S. 1036 (starting engine while plaintiff repairing it); *McHugh v. Manhattan R. Co.*, 179 N. Y. 378 (starting train while plaintiff coupling).

p. 293, n. 76. *Peterson v. Morgan Spring Co.*, 189 Mass. 576 (plaintiff told to "set" his machine). See

McClusky v. Garfield & Proctor C. Co., 180 Mass. 115.

p. 293, n. 78. Roytio v. Litchfield [C. C. A.] 113 Fed. 240 (sending plaintiff under overhanging rock).

p. 294, n. 83. Bertholet v. J. W. Bishop Co., 187 Mass. 32 (too few men moving timber: men had complained among themselves that it was too heavy but not to superintendent. Court); Davis v. Kornman, 141 Ala. 479 (where fasteners flew out of belt, admissible to show that they had done so before in presence of superintendent). See Avery v. Nordyke-Marmon Co., 34 Ind. App. 541 (servant calling foreman's attention to pile of iron which afterward fell).

CHAPTER VI.

CONFORMITY TO ORDERS; RULES.

- § 64. Effect of Clause on Conformity to Orders.**
- 65. Plaintiff Must be Bound to Conform.**
- 66. Order or Direction.**
- 67. Injury Must Result from Having Conformed.**
- 68. Negligence.**
- 69. Effect of Clause on Rules.**
- 70. Act or Omission.**
- 71. Obedience.**
- 72. Rules, By-Laws, and Particular Instructions.**

Section 64. Effect of Clause on Conformity to Orders.*

p. 296, n. 3. Compare New York Laws 1906, c. 657, in Appendix.

p. 296, n. 4. Cleveland, C. C. & St. L. R. Co. v. Scott, 29 Ind. App. 519.

p. 297, n. 5. Indianapolis St. Ry. Co. v. Kane [Ind.] 80 N. E. 841.

p. 298, n. 8. Indiana Mfg. Co. v. Buskirk, 32 Ind. App. 414; Indianapolis St. Ry. Co. v. Kane [Ind.] 80 N. E. 841.

Section 65. Plaintiff Must be Bound to Conform.*

p. 300, n. 14. Consumer's Paper Co. v. Eyer, 160 Ind. 424. (President of corporation gave order and plaintiff bound to conform to it.) See, also, Terre

* 6 Curr. Law, 562.

Haute & I. R. Co. v. Rittenhouse, 28 Ind. App. 633. (Foreman of switch crew). It must appear that person giving order had authority to give it. Ft. Wayne Gas Co. v. Nieman, 33 Ind. App. 178; Indiana Mfg. Co. v. Buskirk, 32 Ind. App. 414; Southern Ind. R. Co. v. Martin, 160 Ind. 280; Indianapolis & G. R. Trans. Co. v. Foreman, 162 Ind. 185; Kansas City M. & B. R. R. Co. v. Thornhill, 141 Ala. 216 (section foreman ordering car removed from track).

Section 66. Order or Direction.*

p. 302, n. 19. Foreman said he was going to ride cars down and plaintiff said "I'll go;" foreman's reply "Well, then go" might be found to be an order. King v. Woodstock Iron Co., 42 So. 27.

p. 302. Plaintiff a brakeman while coupling cars gave signal to back up slowly; another brakeman transmitting the signal changed it to a fast signal and this signal the conductor transmitted. Conductor had not ordered plaintiff to make coupling but it was done in course of plaintiff's duty. Held "this section of the act must be held to apply only to cases where the employe is acting under the special order or direction of one to whose orders and directions at the time of the injury he is bound to conform and is conforming. It could mean nothing more. In performing the ordinary duties of his position the brakeman cannot be held to be, within the meaning of the statute, acting under the special order or direction of the conductor." Grand Rapids & I. R. Co. v. Pettit. 27 Ind.

* 6 Curr. Law, 562.

App. 120 (cited in n. 18). The order or direction must be a special one and performance of plaintiff's general duties does not bring him within act. Where the plaintiff, a fireman in boiler room, and subject to engineer's orders, was engaged in his regular duties when the engineer knocked a prop from an iron plate which fell on the plaintiff, there was no liability. *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414. So where plaintiff was engaged in erecting a building and was directed to take down some joists, in doing which a truss, not yet fastened in place, fell on him it was held that there was no liability. There was no special order, for the direction was as broad as his service; the plaintiff had been hired to do this general work and he was left free to do it according to his own judgment. *McElwaine-Richards Co. v. Wall* [Ind.] 76 N. E. 408. Plaintiff was directed to work in a narrow space where he was injured. "It is shown that a special order was given by Moore, and that the appellee was injured while conforming thereto as he was bound to do. To say that there can be no liability, if the direction pertained to work for the doing of which the servant is employed, would be to write into the statute new terms contrary to its general import and purpose. The employe was injured while in conformance with a special order, at a particular place and time, work which was in keeping with his employment." *Clear Creek Stone Co. v. Carmichael* [Ind. App.] 73 N. E. 935, [Ind.] 76 N. E. 320. A special direction may be implied from circumstances. *Indiana Mfg. Co. v. Buskirk*, 32 Ind. 414. Where foreman directed plaintiff to remove woodwork on bridge pier,

directing the specific manner in which the work should be done it was said "The order given was not as broad as the whole service. . . . It had relation to the doing of a detail of said work at a stated time and place, and was accompanied with specific instructions relating to the manner thereof" and the foreman being negligent the plaintiff could recover. *Toledo St. L. & W. R. Co. v. Pavey* [Ind. App.] 79 N. E. 529. See, also, *Indianapolis St. Ry. Co. v. Kane* [Ind.] 80 N. E. 841.

p. 303, n. 24. See *McElwaine-Richards Co. v. Wall* [Ind.] 76 N. E. 408; *Kansas City M. & B. R. R. Co. v. Thornhill*, 141 Ala. 216 (removing hand car from rails in front of approaching train at foreman's order); *Wilkinson Coop. Glass Co. v. Dickinson*, 35 Ind. App. 230. Foreman told servant to strike block with which he was tamping floor, harder and servant hit side of wall in swinging hammer and hurt plaintiff. No liability.

Section 67. Injury Must Result from Having Conformed.*

p. 304. There must, of course, be some order or direction to the plaintiff: where plaintiff was, during an interval of the work, sitting on a truss when foreman ordered a stone raised which hit him, he could not recover as he was not complying with any order at the time. *Southern Ind. R. Co. v. Harrell*, 161 Ind. 689. It must appear that plaintiff was conforming to order at time of injury. *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178.

* 6 Curr. Law, 562.

p. 304, n. 28. Recovery is now permitted in Indiana where the order to which the plaintiff is conforming is not in itself negligent, but injury is caused by the careless act of the person giving the order while the plaintiff is so conforming. The later Indiana cases follow the English rule rather than the decision in *Hodges v. Standard Wheel Co.*, 152 Ind. 680, cited *supra*, n. 27. The Alabama cases have apparently not taken this view and require that the order itself be negligent, *supra*, n. 8, 27, *infra*, n. 33. *Terre Haute & L. R. Co. v. Rittenhouse*, 28 Ind. App. 633 (foreman ordered plaintiff to make a coupling and while plaintiff was so engaged foreman switched some cars on to him); *Cleveland, C. C. & St. L. R. Co. v. Scott*, 29 Ind. App. 519 (foreman ordered plaintiff to climb old telegraph pole, then ordered men to pull on wire and pole fell); *Consumers' Paper Co. v. Eyer*, 160 Ind. 424 (President of corporation who gave order then turned on gas and hurt plaintiff); *Pittsburgh, C. C. & St. L. R. Co. v. Nicholas*, 165 Ind. 679 (conductor ordered plaintiff to set brakes on car and while plaintiff was so doing conductor gave signal to stop suddenly whereby plaintiff was thrown off); *Thacker v. Chicago, I. & L. R. Co.*, 159 Ind. 82 (foreman having directed plaintiff to go on this service ordered a brakeman to stop hand car and failed to warn plaintiff: the brakeman stopped it suddenly and threw plaintiff off. The foreman was careless in not warning plaintiff that the car was to be stopped and plaintiff might recover); *Toledo, St. L. & W. R. Co. v. Pavey* [Ind. App.] 79 N. E. 529 (foreman ordered plaintiff to remove wood-work from pier and then himself, without warning

plaintiff, pried out timber and injured him); *Muncie Pulp Co. v. Davis*, 162 Ind. 558 (plaintiff was ordered to clean firebox and while so doing some one turned in steam and injured him. The negligence must be that of the person giving the order and as it appears that this order was not negligent and the foreman had not undertaken to protect plaintiff while he executed it, there was no liability); *Rainbow C. & M. Co. v. Martin*, 35 Ind. App. 658 (foreman ordered plaintiff to hold a block while foreman struck it. The foreman missed and hit plaintiff: held no liability for order was not negligent and the striking was not negligent but a mere accident).

Section 68. Negligence.*

p. 308, n. 32. *Thacker v. Chicago, I. & L. R. Co.*, 159 Ind. 82. See cases cited, § 67, n. 28.

p. 308, n. 33. If complaint fails to allege that person giving the order was negligent in relation to the injury, there can be no recovery. *Ft Wayne, I. & S. Co. v. Parsell* [Ind.] 79 N. E. 439; *Creola Lumber Co. v. Mills*, 42 So. 1019. But see *supra*, n. 28.

p. 308, n. 35. While plaintiff was, in obedience to order, pushing a car, and another car was switched on to him by foreman without warning, he can not recover where there is no allegation that he was in a dangerous place or that foreman knew he was. *Chicago & E. R. Co. v. Lain* [Ind. App.] 79 N. E. 547.

p. 309, n. 37. *Clear Creek Stone Co. v. Carmichael* [Ind. App.] 73 N. E. 935, 76 N. E. 320. (Plaintiff di-

* 6 Curr. Law, 562.

rected to work in narrow space and then foreman ordered stone hoisted which hit him). *Creola Lumber Co. v. Mills*, 42 So. 1019, not negligent of engineer to order plaintiff to sand track though that required him to mount the engine.

p. 309, n. 38. *Kansas City M. & B. R. Co. v. Thornhill*, 141 Ala. 216 (ordered to remove hand car from in front of approaching train); *Moss v. Mosley*, 41 So. 1012 (ordering child to clean machinery).

p. 309, n. 39. *Baltimore & O. S. W. R. Co. v. Hunsucker*, 33 Ind. App. 27 (ordering plaintiff to lift too heavy load without warning him of weight); *Chicago, I. & L. R. Co. v. Tackett*, 33 Ind. App. 379 (ordered to use hand car with defective brake); *Republic, I. & S. Co. v. Berkes*, 162 Ind. 517 (ordered iron to be taken out of shears and cut in different place whereby end struck plaintiff); *King v. Woodstock Iron Co.*, 42 So. 27 (ordering boy to move cars without instructing him); *Southern R. Co. v. Blevins* [C. C. A.] 130 Fed. 688 (ordered to knock out bolt and rail sprang up).

p. 310, n. 41. Plaintiff and another servant tamping a floor were told to strike harder but no other directions given and plaintiff attempting to do so was hurt; no liability. *Wilkinson Coop. Glass Co. v. Dickinson*, 35 Ind. App. 230.

Section 69. Effect of Clause on Rules.*

p. 310, n. 42. *Louisville & N. R. Co. v. York*, 128 Ala. 305 (failure to establish rules regulating signals in crowded switch yards may give a cause of action

* 6 Curr. Law, 562.

at common law); *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459 (rules as to kicking cars). "When the business of a master is such that the safety of one servant depends upon the way in which other servants do their work, it is his duty to make, promulgate and enforce reasonable and sufficient rules for the protection of the servant exposed to danger." *Devoe v. New York Cent. & H. R. R. Co.*, 174 N. Y. 1; *McCoy v. New York Cent. & H. R. R. Co.*, 185 N. Y. 276; *Kapella v. Nichols Chemical Co.*, 83 App. Div. 45, 82 N. Y. S. 477; *Shannon v. New York Cent. & H. R. R. Co.*, 88 App. Div. 349, 84 N. Y. S. 646; *Lane v. New York Cent. & H. R. R. Co.*, 93 App. Div. 40, 86 N. Y. S. 947; *Id.*, 107 App. Div. 166, 94 N. Y. S. 988; *Burns v. Palmer*, 107 App. Div. 321, 95 N. Y. S. 161; *Seaboard Air Line R. Co. v. Shanklin* [C. C. A.] 148 Fed. 342. See *Nolan v. New York, N. H. & H. R. Co.* 70 Conn. 159, 43 L. R. A. 314, note. Construction of rule for court. *Denver & R. G. R. Co. v. Maydole*, 33 Colo. 150.

p. 311, n. 44. There is no provision on this subject in the New York Act and this statute creates no new liability for failure to make rules: action for such failure is at common law. *Ward v. Manhattan R. Co.*, 95 App. Div. 437, 88 N. Y. S. 758.

Section 70. Act or Omission.*

p. 316, n. 47. Foreman ordered brakeman to stop hand car and brakeman stopped it so suddenly that plaintiff was thrown off. Cl. 3 gives no right of action where the particular instructions are in themselves

* 6 Curr. Law, 562.

proper but the servant executing them is negligent.
Thacker v. Chicago I. & L. R. Co., 159 Ind. 82.

Section 71. Obedience.*

p. 317, n. 49. See, also, Thacker v. Chicago I. & L. R. Co., 159 Ind. 82.

Section 72. Rules, By-Laws, and Particular Instructions.*

p. 318, n. 50. Ward v. Manhattan R. Co., 95 App. Div. 437, 88 N. Y. S. 758. See Pennsylvania Act in Appendix.

* 6 Curr. Law, 562.

CHAPTER VII.

RAILROAD EMPLOYEES.

- § 73. Effect of Act.
- 74. Charge or Control.
- 75. When Negligence Must Occur.
- 76. Signals, Points, and Switch.
- 77. Locomotive Engine.
- 78. Cars.
- 79. Train.
- 80. Upon a Railway.
- 81. Indiana Clause.

Section 73. Effect of Act.*

p. 322, n. 1. The statutes here cited, being printed merely as examples of legislation in favor of railroad employes, have not been brought down to date. Mass. Rev. Laws, c. 111, § 267, was amended by Mass. Acts 1906, c. 463, Pt. I, §63, which is amended by Mass. Acts 1907, c. 392. See New York and Pennsylvania statutes and Ala. Code, 1907, *infra*, in Appendix.

p. 330, n. 3. This clause of the act was intended for the benefit of railroad employes and to come within its provisions it must appear that the plaintiff's duties were in and about a railroad. *Alabama S. & W. Co. v. Griffin*, 42 So. 1034.

p. 331, n. 4. The statute restricts the class of fellow-servants. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser* [Ind.] 78 N. E. 1033.

* 6 Curr. Law, 562.

Section 74. Charge or Control.

p. 336, n. 12. Engineer went under engine and ordered fireman to raise reverse lever and this started engine injuring the engineer. It was held that the fireman was not in "charge or control." "A fireman may be said to be in charge or control of an engine . . . although the engineer is personally present on it, where under the particular circumstances, in its operation and movement, his duties as fireman require him to do that, which is necessary to its proper and safe operation, and only to that extent . . . A fireman on a locomotive under his ordinary or general duties as such, in his relation to the engineer, while the latter is present and in charge of the engine, cannot be said to be a person who has the charge or control. On the contrary the engineer is the person in charge or control of the engine, and the fireman is subordinate in his position and relation." *Louisville & N. R. Co. v. Goss*, 137 Ala. 319. Conductor had left cars in charge of brakeman and by his negligence they escaped. Case was tried on theory that conductor was negligent but it was held that he was properly absent and had left brakeman in his place. The court does not decide that the brakeman was in charge or control. *Denver & R. G. R. Co. v. Vitello*, 81 Pac. 766.

p. 337, n. 13. It is not necessary under the act that the plaintiff should have been employed on the train in charge of the negligent servant. *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46. Conductor may recover for engineer's negligence in causing collision. *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind.

566. "It was virtually decided upon the former appeal of this case that a liability might arise under this statute for an injury to a conductor through the negligence of an engineer in charge of the engine upon the same train. The question is now directly presented, and we hold that a liability does exist, notwithstanding a rule of the company making the conductor in some respects the superior servant." *Pittsburgh, C. C. & St. L. R. Co. v. Collins* [Ind.] 80 N. E. 415, "A conductor of a freight train may be found to be in charge thereof, although he is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done." *Carroll v. New York, N. H. & H. R. Co.*, 182 Mass. 237.

Section 75. When Negligence Must Occur.*

p. 338. The negligence must occur while the negligent person is in charge or control. *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46. After train got into yard it was taken in charge by a switching crew. While this crew was in charge the train conductor ordered plaintiff, who was a brakeman on the train to couple the air hose and said he would look out for him. While plaintiff was so engaged a switch engine backed up and killed him. Defendant claimed that conductor's duties ceased after the train came into the hands of the switch crew and did not begin again until crew had finished, consequently his order was

* 6 Curr. Law, 562.

not within his scope of authority. There was evidence that it was the usual practice for conductor still to give directions and jury might find it was within his authority. *Edgar v. New York, N. H. & H. R. Co.*, 188 Mass. 420.

Section 76. Signals, Points, and Switch.*

p. 339, n. 17. Flagman went back to signal approaching train; might be negligent in not going back as far as rules required and defendant would be liable. *Jones v. New York, N. H. & H. R. Co.*, 184 Mass. 89; *Cowen v. Ray* [C. C. A.] 108 Fed. 320, cited *infra*, n. 22, belongs here.

Section 77. Locomotive Engine.*

p. 340, n. 23. Pile driver placed on end of flat car on which is an engine which operates the pile driver and also moves the car is not a locomotive engine. The meaning of the words is to be determined by the court. *Jarvis v. Hitch*, 161 Ind. 217. Under Montana Laws, 1903, c. 83, a stationary engine is not within act. *Reinke v. Northern Pac. R. Co.*, 145 Fed. 988.

p. 342, n. 28. Fireman is not a person in charge or control when the engineer is present and directing its management. *Louisville & N. R. Co. v. Goss*, 137 Ala. 319. *Infra*, n. 12, 13.

p. 342, n. 30. See *supra*, § 74.

p. 342, n. 31. *Chicago Term. Trans. R. Co. v. Stone* [C. C. A.] 118 Fed. 19.

* 6 Curr. Law, 562.

p. 343, n. 33. Louisville & N. R. Co. v. York, 128 Ala. 305 (starting engine when plaintiff coupling); Birmingham S. R. Co. v. Cuzzart, 133 Ala. 262 (violently starting engine so that coupling pin jumps out); Bear Creek Mill Co. v. Parker, 134 Ala. 293 (negligence while plaintiff coupling cars); McGhee v. Willis, 134 Ala. 281 (starting engine when plaintiff coupling); Alabama G. S. R. Co. v. Williams, 140 Ala. 230 (running down plaintiff crossing tracks); Louisville & N. R. Co. v. Preston, 40 So. 337 (purposely increasing speed when plaintiff went between cars); Huggins v. Southern R. Co., 41 So. 856 (negligence when plaintiff coupling); Alabama S. & W. Co. v. Griffin, 42 So. 1034 (collision with cars being unloaded); Chicago, I. & L. R. Co. v. Ferguson, 27 Ind. App. 114 (high speed); Baltimore & O. S. W. R. Co. v. Clapp, 35 Ind. App. 403 (running over plaintiff when he was put off train at dangerous place); Southern R. Co. v. Osborn [Ind. App.] 78 N. E. 248 (collision); Pittsburgh, C. C. & St. L. R. Co. v. Gippe, 160 Ind. 360 (collision); Cleveland, C. C. & St. L. R. Co. v. Bergschicker, 162 Ind. 108 (moving engine while it was taking coal); Pittsburgh, C. C. & St. L. R. Co. v. Collins, 163 Ind. 569, 80 N. E. 415 (collision); Pittsburgh, C. C. & St. L. R. Co. v. Peck, 165 Ind. 537 (moving engine when plaintiff caught in track); Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser [Ind.] 78 N. E. 1033 (running over plaintiff in yard); Bowes v. New York, N. H. & H. R. Co., 181 Mass. 89 (engineer not negligent in starting train while plaintiff coupling, in obedience to conductor's signal).

Section 78. Cars.*

p. 344, n. 34. Hand car comes within the Texas statute. *Texas & P. R. Co. v. Smith* [C. C. A.] 114 Fed. 728.

p. 344, n. 35. *Infra*, § 80.

p. 345, n. 38. Conductor placed car too near track. *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46. Conductor failed to warn plaintiff of defective condition of car. *Taylor v. Boston & M. R. Co.*, 188 Mass. 390. Brakeman permitted cars to escape, but case was not tried on theory that he was in charge. Conductor was properly absent leaving him in charge and so not negligent. *Denver & R. G. R. Co. v. Vitello*, 81 Pac. 766.

Section 79. Train.*

p. 348, n. 46. "A conductor of a freight train may be found to be in charge thereof, although he is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done." *Carroll v. New York, N. H. & H. R. Co.*, 182 Mass. 237. Yardmaster may be in charge or control of train. *Brady v. New York, N. H. & H. R. Co.*, 184 Mass. 225.

p. 348, n. 47. Backing cars against car being unloaded causing freight to fall on plaintiff. *Carroll v. New York, N. H. & H. R. Co.*, 182 Mass. 237. Sending plaintiff to couple and starting train. *Bowes v. New York, N. H. & H. R. Co.*, 181 Mass. 89. Moving car without warning against car inspector. *Brady v.*

* 6 Curr. Law, 562.

New York, N. H. & H. R. Co., 184 Mass. 225. Plank had been thrown across flat car so it projected over adjoining track and was struck by approaching train injuring plaintiff. Conductor not negligent. Dacey v. Boston & M. R. Co., 191 Mass. 44. Putting plaintiff off train at dangerous place. Baltimore & O. S. W. R. Co. v. Clapp, 35 Ind. App. 403. Conductor giving signal to start without warning plaintiff. Southern Ind. R. Co. v. Fine, 163 Ind. 617. Yardmaster ordered plaintiff to fasten broken cars together by chain and failed to warn him when engine backed down. Lake Erie & W. R. Co. v. Charman, 161 Ind. 95. Conductor starting train while plaintiff coupling. Chicago I. & L. R. Co. v. Williams [Ind.] 79 N. E. 442.

Section 80. Upon a Railway.*

p. 349, n. 48. "Railroad" in act means a railroad operated by steam. Indianapolis & G. R. Transit Co. v. Andis, 33 Ind. App. 625. In Indianapolis & G. R. Transit Co. v. Foreman, 162 Ind. 85, it is questioned whether the act applies to street railways. The "railroad statutes" cited supra, § 73, are held to refer to dangers peculiar to steam railroads. Minnesota Iron Co. v. Kline, 199 U. S. 593 (Minn. statute applies to railroad dangers rather than to railroad corporations). Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 Fed. 147 (Minn. statute applies to a mining company operating a short line of road); Taggart v. Republic I. & S. Co. [C. C. A.] 141 Fed. 910 (manufacturing company having tracks in its yards is not operating

* 6 Curr. Law, 562.

a railroad under Ohio statute requiring frogs to be blocked); *Reinke v. Northern Pac. R. Co.*, 145 Fed. 988 (man operating a stationary engine does not come under Montana statute, in which engine means locomotive engine and which applies only to railroad risks). So this railroad clause in the act is held to refer to railroad employes. "We cannot for a moment conceive the idea that (the statute) was intended to embrace any employes except those employed in and about a railroad. *Ex vi termini*, in order for the plaintiff to recover under said subdivision, the pleading and proof must show that at the time he was injured he was employed in and about the railroad. It is not sufficient that he was employed at a plant by the same master, who also owned and controlled a railroad, which may be operated in furtherance of the business of the plant. His duties must be in and about the railroad." *Alabama, S. & W. Co. v. Griffin*, 42 So. 1034.

p. 349, n. 50. See *Indianapolis & G. R. Trans. Co. v. Foreman*, 162 Ind. 185, above cited.

p. 350, n. 51. An electric car is not a "locomotive engine" or "train upon a railway." *Indianapolis & G. R. Trans. Co. v. Andis*, 33 Ind. App. 625.

p. 350, n. 55. Stationary engine not within Montana railroad statute. *Reinke v. Northern Pac. R. Co.*, 145 Fed. 988.

p. 350. "Track." Track was not finished but had been used: it was still in charge of the construction foreman and had not yet come under the control of the regular section foreman. "To bring a case within this provision ("of any part of the track of a rail-

way'') it is not essential that the track occasioning the injury should be finished or in charge of the regular section foreman. If it had reached such stage of construction as to become "the track of a railway" and has been adopted for use, though irregularly, negligence of the employee in charge of it, regardless of whether he be what is known as a section foreman or a construction foreman, is chargeable to the employer." *Southern R. Co. v. Howell*, 135 Ala. 639.

Section 81. Indiana Clause.*

p. 351, n. 57. *Indianapolis & G. T. Transit Co. v. Andis*, 33 Ind. App. 625; *Indianapolis & G. T. Transit Co. v. Foreman*, 162 Ind. 185.

p. 353, n. 59. A conductor negligently managed his train and in a case based on this section defendant's counsel contended "that the liability for negligence of one in charge or control of a train . . . is negligence in doing some act which is an act of charge or control of a train done in his superior capacity, and not merely the negligence of such a one occurring at a time when he is in charge or control of a train." The court held "This argument is fallacious and untenable. If this were the true interpretation of this provision of the statute, it would be practically meaningless. A recovery could be had without this part of the act for an injury resulting from the negligence of any one in the performance of a duty owing by the master, and any employe without regard to rank or title, while performing such duty has always been

* 6 Curr. Law, 562.

correctly styled a vice-principal . . . It has been heretofore held by this court that the first part of the fourth subdivision of the act under consideration was independent of the latter part . . . The very object of the provision under consideration was to abolish the rule contended for by appellant, and to avoid the confusion and difficulty before prevailing as to whether an act of negligence on the part of any servant specially enumerated was that of the master or of a fellow-servant." *Chicago I. & L. R. Co. v. Williams* [Ind.] 79 N. E. 442.

p. 354. The defendant contended that the clause requiring that the person injured should have been acting in obedience to the order of some superior was to be construed in immediate connection with each of the two preceeding clauses. But the court held that the Indiana courts construed the clause to be read only in connection with each of the two clauses describing the persons by whose fault the injury happened and that the requirement that he should be acting in conformity to the order of some superior is equivalent to a requirement that he should be acting in the line of his duty as an employe. Therefore, when the plaintiff was not acting in obedience to any special order but in the regular discharge of his duties and was injured by the negligence of the conductor of a train, he could recover under the act. *Cincinnati, H. & D. R. Co. v. Thiebaud* [C. C. A.] 114 Fed. 918. There is a distinction in Indiana between superior servants and vice-principals. At common law, persons described in the "charge or control" clause were fellow-servants. The latter part of this subdivision of the act is an enact-

ment of the common-law vice-principal rule, but is less broad than the common-law rule, since under the act the right of recovery is limited to those hurt while obeying an order of an authorized person. Thus where a foreman ordered a brakeman to stop a hand car and the brakeman did it suddenly whereby plaintiff was injured and neither foreman or brakeman warned him, there could be no recovery under this portion of the act. *Thacker v. Chicago, I. & L. R. Co.*, 159 Ind. 82. See, also, *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250. A complaint which did not charge that the negligence was that of some one at the time acting in the place and performing the duty of the master is bad. "This part of the fourth subdivision does not increase the class of vice-principals existing at common law, and at the same time limits a right of recovery thereunder on account of the negligence of a vice-principal to persons injured while obeying and conforming to the order of some superior having authority to direct." *Ft. Wayne I. & S. Co. v. Parsell* [Ind.] 79 N. E. 439. Doctrine of assumed risk applies to cases under this subdivision. *American Rolling M. Co. v. Hullinger*, 161 Ind. 673.

CHAPTER VIII.

ASSUMPTION OF RISK.

- § 82. Generally.
- 83. Duty of Master.
- 84. Contributory Negligence.
- 85. Volenti non Fit Injuria.
- 86. Distinction between Volenti non Fit Injuria and Contributory Negligence.
- 87. Pleading Assumption of Risk.
- 88. Contractual Assumption.
- 89. Fellow-Servants.
- 90. Dangers Incidental to the Business.
- 91. Transitory Risks.
- 92. Dangers Arising from the Condition of Affairs.
- 93. Dangers Known to Servant.
- 94. Reasonable Care to Discover Dangers.
- 95. Obvious Dangers.
- 96. Dangers Obvious to Minors.
- 97. Extent of Knowledge.
- 98. Presumptions as to Knowledge.
- 99. Duty to Warn.
- 100. When Place or Machinery is not Furnished by Master.
- 101. Contractual Assumption of Risk Applies Only to Servants.

Section 82. Generally.*

p. 358, n. 6. For example of confusion, see *Indiana N. G. & O. Co. v. O'Brien*, 160 Mo. 266. Assumption of risk is one phase of the broader doctrine of *volenti non fit injuria*. *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288.

* 6 Curr. Law, 565.

p. 361, n. 13. "An assumption of risk is a term of the contract of employment, expressed or implied, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty, shall be at the servant's risk." *Narramore v. Cleveland, C. C. & St. L. R. Co.*, 96 Fed. 298. Assumption of risk is an express or implied agreement on the part of the employe. *Atchison T. & S. F. R. Co. v. Bancord* [Kan.] 71 P. 253. "The servant, when he engages in the employment, does so in view of the risks incident to it: that he will be presumed to have contracted with reference to such risks and assumed the same." *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492; *New Castle Bridge Co. v. Doty* [Ind.] 79 N. E. 485. "The common law makes this a part of the contract of employment, the same as if an express stipulation to that effect, committed to writing, had been signed by both parties." *Dowd v. New York O. & W. R. Co.*, 170 N. Y. 459, see *infra* n. 75. Assumption of risk has no place outside of master and servant cases, but incurred risk or its equivalent *volenti non fit injuria* may apply: latter is not founded upon implied agreement as is assumption of risks in master and servant cases. *Indiana N. G. & O. Co. v. O'Brien*, 160 Ind. 266; *Davis Coal Co. v. Polland*, 158 Ind. 607. And see the many similar statements in cases cited *infra*. Where the action was based on a promise to repair it was held that the action lay in tort and not in contract, see *infra* § 115, n. 201. This phraseology may be convenient in stating the mutual duties and disabilities of the relation but ought not to be made the basis of decision as has been done in cases dealing with the

assumption of the risks caused by breach of a statutory obligation, *infra* § 116. "It is not necessary to refine over much for the purpose of ascertaining whether this principle rests on implied contract or on a distinct act of waiver or on the two combined." *Field v. New York Cent. & H. R. Co.* 86 App. Div. 148, 83 N. Y. S. 535 With reference to this question the court in *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247, reviewing the authorities said "The law regarding the assumption of risks is the law which governs the relation of master and servant, and is independent of the will of either. It is not a term of the contract of employment. If it were, then the master and servant could retain it or abolish it in each contract of employment. But they can do neither. It is a principle of the common law, and must be repealed if at all, by the law-making power. It is the law of the land governing all persons who assume the relation of master and servant. It is over and above the contract, and depends in no manner for its existence upon the agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim '*Volenti non fit injuria*.' The law establishing the reciprocal duties and obligations of master and servant never originated out of contract, in the sense that the master and servant ever agreed to them. But the common law imposed these duties and obligations as a regulation of those who assumed this relation, regardless of the desires of the master or the servant." Assumption of risk rests both in an implied contract and on the maxim *Volenti non fit injuria*. *St. Louis Cordage Co. v.*

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Miller [C. C. A.] 126 Fed. 495, citing cases. "We think the learned judge . . . assumed too much in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employe. It is more accurate to say that the services of one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed." *Martin v. Chicago R. I. & P. R. Co.*, 118 Iowa, 148 (quoting our text); *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247 (quoting our text); *Hall v. West & S. Mill* [Wash.] 81 P. 915 (quoting our text in dissenting opinion). See *Implied Contracts in Assumption of Risk*, 5 Columbia L. R. 158.

p. 362, n. 15. *Crown v. Orr* 140 N. Y. 450; *Decatur Car W. Mfg. Co. v. Terry*, 41 So. 839; *Harris v. McNamara*, 97 Ala. 181. See *infra*, § 98.

p. 362, n. 19. A minor entering defendant's employment made an express agreement to comply with the rules. When injured through violating a rule he brought action and defendant pleaded the contract to which plaintiff replied the fact of his minority. The court held plaintiff's replication bad as the action was not in contract but in tort based on the status of master and servant. *Alabama G. S. R. Co. v. Bonner*, 39 So. 619. Where there is a promise to repair the action is in tort and not in contract. *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. S. 133; *Louisville Hotel Co. v. Kaltenbrau* [Ky.] 80 S. W. 1163.

Section 83. Duty of Master.*

p. 364, n. 22. "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if the defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured." *Akers v. Chicago, St. P. M. & O. R. Co.*, 58 Minn. 544; *Southern R. Co. v. Williams*, 143 Ala. 212.

p. 364, n. 25. *Creeden v. Boston & M. R. Co.* [Mass.] 79 N. E. 344 (constable boarding train held a mere licensee taking risk of dangers on the premises); *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 308 (only duty to licensee is to refrain from misconduct); *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152 (no duty to trespassers as to condition of premises); *Huebner v. Hammond*, 80 App. Div. 122, 80 N. Y. S. 295 (plaintiff a longshoreman employed to unload steamer went on lighter to bring it alongside and stepped through grating: as to lighter he was a mere licensee); *Langan v. Tyler* [C. C. A.] 114 Fed. 716 (plaintiff repaired defendant's elevator at request of elevator man, without expectation of pay and without the knowledge or consent of the defendant: a mere licensee and defendant owed him no duty as to his premises).

p. 365, n. 26. *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152; *Alabama S. & W. Co. v. Clements*, 40 So. 971; *Allen v. Florence, C. C. R. Co.*, 15 Colo. App. 213 (plaintiff drove his team on railroad property to un-

* 6 Curr. Law, 565.

load freight and horses became frightened at blowing off of steam. Held he "assumed the risk" of his horses being frightened by sounds incident to the operation of the railroad but not risk of unusual sounds).

p. 365, n. 27. Railroad maintained a park and knew that negroes were assaulted there, yet without warning transported a negro in its car to the park where he was assaulted. Held plaintiff was an invited person entitled to notice of this danger and could recover. *Indianapolis St. R. Co. v. Dawson*, 31 Ind. App. 605.

p. 366, n. 28. Where plaintiff testified that foreman had given him a job and told him to select his room and he was looking for it when injured and defendant denied this and said plaintiff was there looking for work and voluntarily, the question whether he was an invited person was for the jury. *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152. Independent contractor working on defendant's business is an invited person. *Wagner v. Boston El. R. Co.*, 188 Mass. 437; *Sullivan v. New Bedford G. & E. L. Co.*, 190 Mass. 288.

p. 367, n. 30. *Alabama S. & W. Co. v. Clements*, 40 So. 971; *Sullivan v. New Bedford G. & E. L. Co.*, 190 Mass. 288 (independent contractor using employer's apparatus is invited to use such apparatus as is furnished him and there is no obligation on employer with reference to obvious defects in it).

p. 367, n. 31. *Sloss I. & S. Co. v. Knowles*, 129 Ala. 410, 30 So. 584 (man at work in mine said he was there by invitation but was not a servant: this however did not change the rule as to dangers in the place of work).

p. 368, n. 32. See *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *infra*, n. 75.

p. 370, n. 39. Plaintiff driving his team to railroad property to unload freight "assumes the risk" of his horses being frightened by noises incident to railroad operation. *Allen v. Florence C. C. R. Co.*, 15 Colo. App. 213. Tenant injured by explosion of gas sued his landlord: said doctrine of assumption of risk did not apply. *Indianapolis Abbatoir Co. v. Temperly*, 159 Ind. 651. Term assumption of risk applies to two distinct things, one the risks naturally incident to the work, the other risks arising from the master's negligence and assumed by continuance at work. *Vohs v. Shorthill & Co.* [Iowa] 107 N. W. 417. An instruction that the risks assumed by the servant are the ordinary and usual risks incident to his employment and do not include risks arising from the master's negligence is erroneous. *Illinois Cent. R. Co. v. Fitzpatrick* [Ill.] 81 N. E. 529.

p. 371, n. 40. *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338 (emery wheel bought in market burst from latent defect).

Section 84. Contributory Negligence.*

p. 371, n. 42. See *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *infra*, n. 75.

p. 372, n. 43. *Southern Ind. R. Co. v. Fine*, 163 Ind. 617; *Turnbull v. New Orleans & C. R. Co.* [C. C. A.] 120 Fed. 783; *Black v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 797; *The Frey*, 113 Fed. 1003 (in admiralty).

* 6 Curr. Law, 565.

p. 374, n. 47. *City of Indianapolis v. Keeley* [Ind.] 79 N. E. 499. Contributory negligence is to be proved by a fair preponderance of the evidence and defendant (who under St. 1901, c. 359a, has the burden) is not required to have a preponderance plus so much evidence as may be deemed necessary to outweigh a presumption in favor of plaintiff.

p. 375, n. 48. *Slattery v. D. W. & W. R. Co.*, 3 App. Cas. 1155. The presumption is that the instinct of self-preservation is possessed and exercised. *Terre Haute Elec. Co. v. Kiely*, 35 Ind. App. 180. When there is no evidence one way or the other it may be presumed that plaintiff exercised due care. But from this presumption of due care it cannot be inferred or presumed that defendant was negligent. It is to be presumed that defendant also performed his duty. One presumption cannot be built on the other. *Looney v. Metropolitan R. Co.*, 200 U. S. 480. The presumption that plaintiff was prompted by the instinct of self-preservation and so exercised due care has no place where there is direct evidence as to the circumstances surrounding the accident. *Ames v. Waterloo & C. F. R. T. Co.* [Iowa] 95 N. W. 161, 57 Cent. L. J. 353. By St. 1901, c. 359a, defendant must plead contributory negligence in Indiana. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274 (if in plaintiff's evidence it appears that he was negligent, it is as effective as if defendant had proved it); *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247; *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind. 569 (plaintiff need not allege due care under employers' liability act); *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 76 (182)

N. E. 1060; *Chicago & E. R. Co. v. Lawrence* [Ind.] 79 N. E. 363; *Stephens v. American, C. & F. Co.* [Ind. App.] 78 N. E. 335. Contributory negligence though an affirmative defense of which defendant has burden may be shown under general denial. *New Castle Bridge Co. v. Doty* [Ind. App.] 76 N. E. 557; *Roberts v. Terre Haute Elec. Co.* [Ind. App.] 76 N. E. 895.

p. 375, n. 49. In New York plaintiff has burden of proving his due care. *Williams v. Delaware, L. & W. R. Co.*, 39 App. Div. 647, 57 N. Y. S. 203; *Id.*, 116 N. Y. 628; *Lowry v. Anderson Co.*, 96 App. Div. 465, 89 N. Y. S. 107; *Scialo v. Steffens*, 105 App. Div. 592, 94 N. Y. S. 305.

p. 376, n. 50. A request to direct a verdict made by defendant who has the burden of proving contributory negligence should not be granted when the verdict must be based upon the testimony of witnesses, wholly or partially. *Stephens v. American, C. & F. Co.* [Ind. App.] 78 N. E. 335.

p. 376, n. 52. Knowledge on the part of the plaintiff is an element in each defense but it has been said to be a defense only where the plaintiff willingly encounters dangers and is evidence on the question of contributory negligence. *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181.

p. 377, n. 53. Between the ages of seven and fourteen, a child is incapable of exercising judgment and discretion, but evidence may be received to show capacity and contributory negligence can seldom be imputed to him as matter of law. *Tutwiler, C. C. & I. Co. v. Enslin*, 129 Ala. 336. Where the question is whether a boy of 16 exercised due care the jury should

be instructed to consider his age and appearance. *Keating v. Coon*, 102 App. Div. 112, 92 N. Y. S. 474.

p. 378, n. 55. Drunkenness does not relieve one from the exercise of such care as a sober person would take under the circumstances. *Nash v. Southern R. Co.*, 136 Ala. 177. Plaintiff being drunk was helped up station steps by defendant's servants who permitted him to fall. If his voluntary intoxication was the direct or proximate cause he could not recover but here it is a condition rather than a cause and the defendant being the last actor is responsible. *Black v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 797.

Section 85. *Volenti non Fit Injuria.*

p. 379, n. 57. *Hott v. Wilkes*, 3 Barn. & Ald. 304 (trespasser knowing of spring guns and entering premises); *Giles v. London County Council*, 68 J. P. 10 (plaintiff playing cricket in park ran into post placed there by fellow club-member to reserve the grounds); *Messenger v. Gordon*, 15 Colo. App. 429 (plaintiff's cattle mired in defendant's irrigation ditch); *Southern R. Co. v. Crowder*, 135 Ala. 417 (passenger bound to know that freight trains jolt more than passenger trains and if he rides in them, takes his risk); *Hedekin v. Gillespie*, 33 Ind. App. 650 (tenant knowing of defective board walk leased the premises); *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592 (stranger knowing danger but keeping on is not necessarily precluded from recovery); *Citizens St. R. Co. v. Jolly*, 161 Ind. 80 (passenger boarding crowded car); *Indiana N. G. & O. Co. v. O'Brien*, 160

Ind. 266 (in cases of strangers "assumption of risk" does not apply but "incurred risk" or its equivalent *volenti non fit injuria* does). Where land owner elected to retain part of his estate and be assessed for the betterment resulting to it from the public improvement rather than surrender his whole estate and take damages "He stands in such relation towards the defendants as to render the maxim *volenti non fit injuria* an answer to the case made by the bill." *Dorgan v. City of Boston*, 12 Allen [Mass.] 223. See examples in Hughes, *Technology of Law* p. 225.

p. 380, n. 60. See *infra*, § 97. "There must be a thorough comprehension on his part of the danger and the risk and a voluntary undertaking by him of that risk and danger." *Brooke v. Ramsden*, 63 L. T. [N. S.] 287.

p. 380, n. 62. *Wagner v. Boston El. R. Co.*, 188 Mass. 437.

p. 381, n. 65. *Wagner v. Boston El. R. Co.*, 188 Mass. 437.

Section 86. Distinction between *Volenti non Fit Injuria* and Contributory Negligence.*

p. 386, n. 75. It is said that freedom of will distinguishes *volenti non fit injuria* from contributory negligence. *Indiana N. G. & O. Co. v. O'Brien*, 160 Ind. 266; *American Rolling M. Co. v. Hullinger*, 161 Ind. 673. That assumption of risk rests in contract, contributory negligence in torts. *Montgomery v. Seaboard Air Line R.*, 73 S. C. 503; *Chicago & E. I. R. Co.*

* 6 Curr. Law, 565.

v. Heerey, 203 Ill. 492; *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495; *Crookston Lumber Co. v. Boutin* [C. C. A.] 149 Fed. 680, citing many cases; *Bodie v. Charleston & W. C. R. Co.*, 61 S. C. 468. Or that one rests in contract and the other in conduct. *Davis Coal Co. v. Polland*, 158 Ind. 607; *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 76 N. E. 1060; *Monongahela River Consol. C. & C. Co. v. Hardsaw* [Ind. App.] 79 N. E. 1062; *Blundell v. Miller Elev. Mfg. Co.*, 189 Mo. 552. See, also, *Texas & N. O. R. Co. v. Conroy*, 83 Tex. 214. Assumption of risk "is distinct in principle from the doctrine of contributory negligence although they have frequently been confounded by the courts. In many cases this is owing to the fact that it appeared from the plaintiff's own showing that he knew of the dangers in advance and hence his complaint was properly dismissed. . . . Contributory negligence prevents a recovery because the plaintiff of his own volition, intervenes between the negligence of the defendant and the injury received, so that the former is not the sole cause of the latter. Negligence implies a voluntary act or omission. Upon the assumption that the defendant is guilty of a negligent act and that, intervening between it and the injury, the plaintiff is guilty of a negligent act which also contributes to the injury, as the defendant's negligence is not the sole juridical cause of the accident the plaintiff cannot recover. The reason does not rest upon contract but upon the inherent nature of negligence. . . . On the other hand the doctrine of assumed risks rests upon a contract impliedly made before the negligent act of the defendant which caused

the injury was committed. The plaintiff impliedly assumed the risk in advance and his compensation is presumed to have been adjusted on that basis. Before commencing the work at all, he agreed to waive any right of action which he might otherwise have on account of the habitual or occasional negligence of the defendant, known to him before the accident happened. He impliedly agreed to waive the negligence of the defendant, not the results of his own negligence, for a contract is implied only where reasonably necessary and the law provides for his own negligence without any agreement. . . . By assuming the risk, the plaintiff does not intervene but waives. Intervention in order to break the causal connection between the negligent act and the injury must come in between them. The assumption of risk does not come in between, but is in advance of both. The independent will of the plaintiff is not exercised by intervening, but by voluntarily waiving and releasing, when he entered the service, any right of action which might accrue to him from the cause stated. . . . Sometimes the principle, which exempts the master from liability when the risk is obvious, is placed upon the ground of waiver, but this is the same in effect . . . for a waiver exists either by contract or estoppel and, unless shown by the plaintiff in developing his case, must be proved by the defendant as a defense." *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. S. 133; *Hoelter v. McDonald*, 82 App. Div. 423, 81 N. Y. S. 616. There is a distinction between contributory negligence and *volenti non fit injuria*. The former is

a breach of the legal duty resting on plaintiff to use care while the latter arises from a voluntary act of the plaintiff. "Volens not sciens is the test." *Dempsey v. Sawyer*, 95 Me. 295. Though assumption of risk and contributory negligence are distinct defenses they are matters in confession and avoidance and are to be so pleaded. *Foley v. Pioneer M. & Mfg. Co.*, 40 So. 273; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254 (and separately pleaded). *Infra* § 87. It is said that assumption of risk is but a phase of contributory negligence. *Koepcke v. Wisconsin B. & I. Co.* [Wis.] 92 N. W. 558. Also that assumption of risk is one phase of the broader doctrine of *volenti non fit injuria*. *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288.

p. 387, n. 77. *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *Kinney v. Rutland R. Co.*, 99 N. Y. S. 800; *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495, citing cases.

p. 388. That the two defenses often fade into each other and may arise on the same state of facts, see *Kinney v. Rutland R. Co.*, 99 N. Y. S. 800; *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503; *Chicago & G. W. R. Co. v. Crotty* [C. C. A.] 141 Fed. 913; *Suttle v. Choctaw, O. & G. R. Co.* [C. C. A.] 144 Fed. 668. But it is often necessary to distinguish them sharply for a man may be in the exercise of due care at the moment of injury, be prudently attempting to protect himself from the danger, and yet be denied recovery because the particular risk was one which he accepted upon entry into the employment, or if it occurred after that time, because he had so conducted himself with refer-

ence to it as to have voluntarily undertaken this new risk. Compare *Schlemmer v. Buffalo R. & P. R. Co.*, 27 Sup. Ct. R. 407, 205 U. S. 1, 64 Cent. L. J. 345.

Section 87. Pleading Assumption of Risk.*

p. 389, n. 80. Plaintiff must allege lack of knowledge both actual and constructive of the defect or negligence. *Standard Cement Co. v. Minor*, 27 Ind. App. 479; *Indiana Mfg. Co. v. Wells*, 31 Ind. App. 460; *Indiana, N. G. & O. Co. v. O'Brien*, 160 Ind. 266; *Chicago I. & L. R. Co. v. Barnes*, 164 Ind. 143; *Grand Trunk W. R. Co. v. Melrose* [Ind.] 78 N. E. 190. Or when performing more hazardous work. *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 355. Or when counting on incompetency of servant. *Indianapolis & G. R. Trans. Co. v. Foreman*, 162 Ind. 185. Where complaint denies plaintiff's knowledge it need not allege that he had no means of knowledge or no opportunity to observe. *Consolidated Stone Co. v. Williams*, 26 Ind. App. 131; *Monongahela R. Consol. C. & C. Co. v. Hardsaw* [Ind. App.] 77 N. E. 363, 79 N. E. 1062; *Baltimore, O. S. R. Co. v. Roberts*, 161 Ind. 1; *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 76 N. E. 1060. Allegation that plaintiff "believed (passage way) was made safe" insufficient. *Ohio Valley Coffin Co. v. Goble*, 28 Ind. App. 362. Rule that plaintiff must negative knowledge is not abrogated by St. 1901, c. 359a, relating to contributory negligence. *Bowles v. Indiana R. Co.*, 27 Ind. App. 672.

p. 390, n. 81. Knowledge on the part of a servant is a defense only when the servant willingly encounters

* 6 Curr. Law, 587.

dangers but it is evidence always on the issue of contributory negligence. *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181.

p. 390, n. 82. If complaint shows knowledge it must allege reasons for the servant's continuance in the employment. *Indianapolis & G. R. Trans. Co. v. Foreman*, 162 Ind. 185. Defendant may prove assumption of risk under general denial. *American, C. & F. Co. v. Clark*, 32 Ind. App. 644.

p. 390, n. 83. *Moss v. Mosley*, 41 So. 1012.

p. 391, n. 84. Contributory negligence and assumption of risk though distinct defenses are yet pleas in confession and avoidance to be specially pleaded and they cannot be set up under a general denial. *Foley v. Pioneer M. & Mfg. Co.*, 40 So. 273; *Western R. of Ala. v. Russell*, 39 So. 311. Plea should show danger and that it was obvious. *Alabama, G. S. R. Co. v. Brooks*, 135 Ala. 401. Where complaint sets out willful negligence, assumption of risk cannot be pleaded. *Birmingham, S. R. Co. v. Powell*, 136 Ala. 232; *Tennessee C. I. & R. Co. v. Bridges*, 39 So. 902. And it cannot be pleaded to a complaint on violation of a statute which in terms provides that it shall not be a defense. *Kansas City M. & B. R. Co. v. Flipppo*, 138 Ala. 487.

p. 391, n. 85. See *supra*, n. 75. Where complaint fails to negative that plaintiff was ignorant of the dangerous condition of the ditch in which his cattle were mired it will be presumed that he knew and consequently assumed the risk. *Messenger v. Gordon*, 15 Colo. App. 429. Assumption of risk need not be pleaded. *City of Greeley v. Foster*, 32 Colo. 292.

p. 391. In New York the question has recently been debated. A plaintiff was injured by a car kicked on him. There was no evidence that plaintiff necessarily knew of the practice: if the burden was on plaintiff to show affirmatively his lack of knowledge the evidence was insufficient to permit him to recover but if the burden was on the defendant the question was for the jury. It was held that the burden was on the defendant. The court said "when the plaintiff's intestate entered the service of the defendant he impliedly assumed the obvious risks of the business and waived any right of action on account thereof. . . . Furthermore, by continuing at work, with no prospect of a change of method, he waived such dangers as he subsequently discovered. The doctrine of assumed risks rests upon the implication of a promise by the employe to waive the consequences of dangers of which he is fully aware. . . . Whether the fact of a known or obvious risk is proved by the one party or the other is immaterial provided it is proved at all, but the question now before us is upon whom rests the burden of proof in this respect. If the plaintiff knows the danger, under ordinary circumstances he waives it, but is the waiver or defense to be alleged and proved by the defendant, or only a form of contributory negligence, the absence of which is part of the plaintiff's case?" Then after distinguishing the two defenses and holding that the plaintiff's waiver is not a form of contributory negligence (see *infra* § 86, n. 75) the court said, "A waiver . . . unless shown by the plaintiff in developing his case, must be proved by the defendant as a defense. . . . We think that the burden of showing

that the servant assumed the risk of obvious dangers rests upon the master and hence we cannot say as a matter of law, that the jury in the case before us, was compelled to find that the plaintiff's intestate knew or should have known of the practice of kicking cars on a track where car repairers were at work." *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *Allison v. Long Clove T. R. Co.*, 75 App. Div. 267, 78 N. Y. S. 69; *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. S. 133; *Devreux v. Utica S. C. Mills*, 84 App. Div. 34, 82 N. Y. S. 145; *Fremont v. Boston & M. R. Co.*, 98 N. Y. S. 179. "As the proof was all one way it was proper to direct a verdict. This is so notwithstanding the fact that where there is any dispute in the evidence, or room for conflicting inferences to be drawn from the undisputed evidence, the burden of proof as to the assumption of the risk of employment is upon the defendant." *Kneekel v. O'Connor*, 73 App. Div. 594, 76 N. Y. S. 829. Plaintiff said he did not know there were no rules as to moving engine which was being cleaned. Burden of proof was on defendant to show plaintiff's knowledge and assumption and verdict could not be directed. *Lane v. New York Cent. & H. R. R. Co.*, 107 App. Div. 166, 94 N. Y. S. 988; *Rooney v. Brogan Const. Co.*, 107 App. Div. 258, 95 N. Y. S. 1 (unguarded hole in floor); *Hunt v. Dexter, S. P. & P. Co.*, 100 App. Div. 119, 91 N. Y. S. 279; *Id.*, 183 N. Y. 544 (explosion of digester); *Welle v. Celluloid Co.*, 175 N. Y. 401 (use of short instead of long hooks on chain). It would appear that although the defendant has the burden of proving assumption of risk, that he is not obliged to plead it specially. Where all the facts es-

sential to the maintenance of the defense appear in the plaintiff's evidence, the defendant may avail himself of the defense although he did not plead it specially. *White v. Lewiston & Y. F. R. Co.*, 94 App. Div. 4, 87 N. Y. S. 901; *Ehrenfried v. Lackawanna I. & S. Co.*, 89 App. Div. 130, 85 N. Y. S. 57. Aff. without opinion 180 N. Y. 515 in which *Stowe, Williams and McLennan, JJ.* held that while the case of *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459, decided on which party the burden of proof rested, it did not decide that the defendant must plead specially assumption of risk; that it had not heretofore been the practice so to plead it, but that the defense was available under a general denial. *Spring and Hiscock, JJ.* held that the defense must be specially pleaded. See *Scheir v. Quirin*, 78 N. Y. S. 956, 77 App. Div. 624, 177 N. Y. 568; *Finn v. Iron Clad Mfg. Co.*, 90 N. Y. S. 887, 99 App. Div. 625, 76 N. E. 1095. The question of pleading the defense was raised in the following cases but for one reason or another it was unnecessary to pass upon it. *Kilkin v. New York Cent. & H. R. Co.*, 76 App. Div. 529, 78 N. Y. S. 568; *Quinlan v. New York, N. H. & H. R. Co.*, 89 App. Div. 266, 85 N. Y. S. 814; *Sitts v. Waiontha Knitting Co. Ltd.*, 94 App. Div. 38, 87 N. Y. S. 911; *Overbaugh v. Wieber*, 106 App. Div. 283, 94 N. Y. S. 644. The rule of pleading has in some cases been assimilated to the rule of pleading contributory negligence. Thus, in Illinois, although a distinction is made between contributory negligence and assumption of risk, yet it is held that the burden of proving assumption of risk rests on the plaintiff in analogy to the rule as to contributory negligence. *Chicago & E. I. R. Co. v. Heerey*,

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203 Ill. 492. And in South Carolina where the two defenses are distinguished it is held that each must be pleaded in defense. "While a plea of contributory negligence involves an admission of the alleged negligence of the defendant and avoids it by new matter, a plea of assumption of risk involves an admission of the alleged contractual relation of master and servant between the plaintiff and defendant and injury as a result of risks incurred by plaintiff, but avoids liability by new matter showing that the injury resulted from risks voluntarily assumed by plaintiff. Therefore, any reason which supports contributory negligence as an affirmative defense to be pleaded, will also support assumption of risks as an affirmative defense to be pleaded, and every suggestion which may be urged to show that "assumption of risk" may be shown under a general denial may with equal force be urged to overthrow the well settled rule in this state that a general denial will not support the defense of contributory negligence." *Montgomery v. Seaboard Air Line R.*, 73 S. C. 503. With this compare the reasoning in *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459, quoted *supra* where a distinction was made between contributory negligence and assumption of risk and the burden of the former held to rest on the plaintiff and of the latter on the defendant. In North Carolina assumption of risk is a plea in confession and avoidance to be pleaded and proved by the defendant. If it is not pleaded it is not in issue. It cannot be submitted in the same issue with contributory negligence which also must be specially pleaded. *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254. If it once be

determined that there is a distinction between contributory negligence and assumption of risk, in whatever sense this term may be used, there seems to be no advantage in reasoning from one to the other to determine on whom rests the burden of proving this assumption of risk and the consequent mode of pleading to be followed. Whatever is part of the plaintiff's case in making out the elements of actionable negligence, duty owed him by the defendant, failure to perform that duty and injury proximately resulting must be alleged and proved by him and is put in issue by a general denial: whatever admits the existence of these elements but avoids the consequent liability is new matter outside the plaintiff's case, to be specially pleaded and proved by the defendant. *Supra*, § 82. It is necessary, therefore, to see precisely what the phrase "assumption of risk" means. It covers first, the disabilities peculiar to the relation of master and servant such as the risks incident to a properly conducted business and the risk of fellow-servant's negligence, then the risks arising out of the condition of the premises or the method of conducting the business into which the employe elects to enter: these risks relate to the time of entering the service and have been called "contractual assumption of risk" or "servant's disabilities." *Infra*, § 88. The defendant owed the plaintiff no duty whatever before he chose to become a servant, when he does choose to become a servant the only duty which the master owes him is as to the risks the servant is about to encounter which he cannot be presumed to know and understand. He is held to know the incidental risks of a properly conducted

business, he is held to know the risks of fellow-servants and he is held to know the obvious dangers of the premises, in the latter case "obvious" meaning obvious to one using due care to discover them and thus bringing into issue the discretion, judgment and experience of the plaintiff. *Infra*, § 88 et seq. This "contractual assumption of risk" or these disabilities imposed upon the servant by the policy of the law, which ever statement is preferable, relate solely to defining what duty the master owes to this servant. There were no duties before he became a servant and the question is what duties toward the servant were imposed upon the master when he took this particular servant into his employment as well as what risks were then accepted by the servant. To constitute negligence there must first be a duty to be neglected and whether this duty is created or waived by contract or by the maxim *volenti non fit injuria* does not seem important. The burden of defining, alleging, and proving the duty, rests on the plaintiff and consequently the defendant should not be obliged to plead or prove that the injury arose from an incidental risk, an obvious danger or the negligence of a fellow-servant. In other words the risks assumed upon entering the employment are to be put in issue by a general denial and the burden of proof does not rest on the defendant. If, after the employment is accepted the defendant fails to perform a duty cast on him and the plaintiff knowing this and appreciating the risk elects to remain at work and take his chance, then the question is not of defining the duty, which still belongs to the plaintiff, but of showing these facts to relieve the defendant of the consequences of his neglect, *infra*, § 114. This is the

defense of *volenti non fit injuria*, which is also called assumption of risk, and is strictly an affirmative defense to be specially pleaded and proved by the defendant. This view has been taken in Iowa where it is said that the term "assumption of risk" applies to two distinct things, one the assumption of risks naturally incident to the work and the other risks arising from the master's negligence and assumed by continuance at work: the first need not be pleaded, but the second must be as it is an affirmative defense. *Vohs v. Shorthill & Co.* [Iowa] 107 N. W. 417. The first kind of assumption adheres in the contract of employment, is put in issue by a simple denial and need not be pleaded as there is no negligence on the master's part in such case, but the second kind of assumption arises out of the master's negligence and being in the nature of confession and avoidance must be specially pleaded. *Martin v. Des Moines E. L. Co.* [Iowa] 106 N. W. 359. In Oregon it has been held "It is not alleged in the answer that plaintiff's intestate assumed the risk that caused his injury, and such averment is unnecessary, if the hazard was ordinary, for the rule of the common law is that where a servant, of suitable age and sufficient intelligence, enters into the employ of the master, he is presumed to understand, and, therefore, in consideration of the rate of compensation agreed to be paid, voluntarily assumes, all the risks ordinarily incident to the business in which he engages; and whenever the law presumes a fact, it is not necessary to aver the same in a pleading. The rule appears to be otherwise, however, in respect to extraordinary risks, in which case the servant's assumption thereof to be available as a

waiver, must be affirmatively alleged in the answer. . . . The servant's assumption of extraordinary risks is a waiver in advance of all claims for damage that may arise in consequence of the master's negligence, and, as a plea of such fact admits a right of action in the servant, but seeks to avoid recovery by reason of the waiver, it seems to be necessary to allege such defense, if relied upon." *Tucker v. Northern Terminal Co.*, 41 Or. 82.

p. 391, n. 87. *Evansville, G. & E. L. Co. v. Raley* [Ind. App.] 76 N. E. 548 (burden on plaintiff to show that risk of injury received was not incidental to the business); *Cleveland, C. C. & St. L. R. Co. v. Scott*, 29 Ind. App. 519.

p. 392, n. 89. *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206 (burden on defendant to show that plaintiff knew of defect in track); *Alabama, S. & W. Co. v. Wrenn*, 136 Ala. 475 (charge stating that plaintiff had burden of showing that he did not assume risk created by superintendent's negligence erroneous).

p. 393, n. 94. In master and servant cases plaintiff must negative knowledge but in cases where the plaintiff is a stranger he need not do so, since in latter "assumption of risk" has no place though *maxim volenti non fit injuria* applies. *Indiana, N. G. & O. Co. v. O'Brien*, 160 Ind. 266; *Citizens St. R. Co. v. Jolly*, 161 Ind. 80 (passenger).

Section 88. Contractual Assumption.*

p. 394, n. 97. By entering the employment the servant assumes the risks incident to it and "also the

* 6 Curr. Law, 565.

risks and perils incident to the use of the machinery and property of the defendant as it then was; so far as such risks were apparent." *Gibson v. Erie R. Co.*, 63 N. Y. 449. "A servant assumes not only the risks incident to his employment, but all dangers which are obvious and apparent, and so if he voluntarily enters into, or continues in the service, having knowledge or the means of knowing, the dangers involved, he is deemed to assume the risks and to waive any claim for damages against the master in case of personal injury." *Maltby v. Belden*, 167 N. Y. 307; *Crown v. Orr*, 140 N. Y. 450. "The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employe, but on an independent act of waiver evidenced by his continuing in the employment with a full knowledge of all the facts." *Drake v. Auburn City R. Co.*, 173 N. Y. 466.

p. 395. Whether a child of tender years is subjected to the fellow-servant rule, see *Evans v. Josephine Mills*, 119 Ga. 448, *infra*, § 98.

p. 399, n. 111. *Fearns v. New York Cent. & H. R. R. Co.*, 186 Mass. 529. Brakeman assumes ordinary risks of business including permanent structures erected for proper purposes at reasonable distances from the tracks "whether then in existence or erected afterwards." *Chambers v. Chester*, 172 Mo. 461. Master changing grade of powder must notify servant unless latter knows it.

p. 399, n. 114. See *Kline v. Abraham*, 178 N. Y. 377. Slipping on marble stairs.

p. 400, n. 115. Risk caused by superintendent's carelessness is not assumed. *Mahoney v. Bay State*

P. G. Co., 184 Mass. 287; *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18; *Rafferty v. Nawn*, 182 Mass. 503; *Meagher v. Crawford Laundry Mch. Co.*, 187 Mass. 586; *Baggneski v. Mills* [Mass.] 78 N. E. 852; *Postal Tel. C. Co. v. Hulsey*, 132 Ala. 444. See, also, *Rockport Granite Co. v. Bjornholm* [C. C. A.] 115 Fed. 947. Or of person to whose orders plaintiff is obliged to conform. *Reiter-Conley Mfg. Co. v. Hamlin*, 40 So. 280; *Terre Haute & I. R. Co. v. Rittenhouse*, 28 Ind. App. 633; *Indianapolis St. Ry. Co. v. Kane* [Ind.] 80 N. E. 841. Or of person in charge or control. *Alabama, G. S. R. Co. v. Brooks*, 135 Ala. 401; *Carroll v. New York, N. H. & H. R. Co.*, 182 Mass. 237; *Bowes v. New York, N. H. & H. R. Co.*, 181 Mass. 89; *Pittsburgh, C. C. & St. L. R. Co. v. Nicholas*, 165 Ind. 679. "The rule of law as to assumption of risk does not apply where there is negligence on the part of the master in furnishing suitable instrumentalities for doing the work." *Chambers v. Wampanoag Mills*, 189 Mass. 529 (shuttle guard); *Boucher v. Robeson Mills*, 182 Mass. 500 (belt); *Keeley v. Boston El. R. Co.* [Mass.] 78 N. E. 490 (current on third rail while repairs being made); *Monongahela River Consol. C. & C. Co. v. Hardsaw* [Ind. App.] 79 N. E. 1062; *Southern S. C. & C. Co. v. Swinney*, 42 So. 808 (defective switch); *Northern Ala. R. Co. v. Shea*, 142 Ala. 119 (defective track); *Smith v. New York C. & St. L. R. Co.* 86 App. Div. 188, 83 N. Y. S. 259; *Id.*, 178 N. Y. 635 (inspecting air hose). Cases of failure of master to perform the duties cast on him and whether the servant by his conduct has voluntarily assumed the risk of such negligence will be found in Chap. IX. An instruction that the risks assumed by servant are the ordinary and

usual risks incident to his employment and do not include that arising from master's negligence, known to servant who remains at work, is erroneous. *Illinois Cent. R. Co. v. Fitzpatrick* [Ill.] 81 N. E. 529.

p. 400, n. 116. *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1. *Infra*, § 111.

Section 89. Fellow-Servants.*

p. 400, n. 117. "The principle that, where a person accepts employment in a business in which others are engaged with him, there is an implied agreement upon his part to assume all the ordinary risks attendant upon such business, including accidents which result from the carelessness of co-employees; and the foundation upon which it rests is unity of service and control." *Breslin v. Sparks*, 97 App. Div. 69, 89 N. Y. S. 627 (longshoreman not employed by defendant but injured by defendant's servant working with him).

p. 401, n. 119. Need not warn plaintiff of possible or probable dangers that may arise from fellow-servant's negligence. *Klos v. Hudson River O. & I. Co.*, 77 App. Div. 566, 79 N. Y. S. 156. Whether fellow-servant rule applies to children of tender years, see *infra*, § 98.

p. 404, n. 124. Making one a conductor who for seven years has served in inferior grades is not of itself negligence or evidence of negligence where it does not appear that he had ever been incompetent or unfaithful. *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. 129; *Id.*, 56 N. Y. 608. Should use reasonable

* 6 Curr. Law, 562.

care to see that engineer is fit for his job. *Alabama & F. R. R. Co. v. Waller*, 48 Ala. 459. Superintendent knew of motorman's incompetency. *Cooney v. Commonwealth Ave. St. Ry. Co.* [Mass.] 81 N. E. 905. The man who hired a negligent brakeman was his cousin and was in doubt as to the brakeman's proper control of himself when braking cars, evidence for jury. *Elliott v. Canadian Pac. R. Co.*, 129 Fed. 163. Superintendent knew that it was necessary to have a careful man in charge of blasting and when asked if man that he had hired for that purpose had any experience replied "not that I know of": evidence for jury. *James Ramage Paper Co v. Bulduzzi* [C. C. A.] 147 Fed. 151. That engineer was licensed only as marine engineer and held no license to operate stationary engine is not evidence of incompetence. He permitted a stranger to operate the engine but defendant did not know it. *Gillen v. McAllister*, 97 App. Div. 310, 89 N. Y. S. 953. Defendant has duty of seeing whether his engineer is competent and of discharging incompetent servants, but having exercised due care in employing a competent servant he may rely on the presumption that he continues competent until he has notice to the contrary. After proof of servant's incompetency his general reputation is admissible but not his reputation among a particular class. *Southern Pac. Co. v. Hetzer* [C. C. A.] 135 Fed. 272. Duty of defendant to observe the habits of his engineer. *Southern Pac. Co. v. Huntsman* [C. C. A.] 118 Fed. 412. Negligence must be habitual rather than occasional to render master responsible for retaining him. *First Nat. Bk. v. Chandler*, 39 So. 822. Plaintiff must allege incompetence in order to rely on

it. *City of Greeley v. Foster*, 32 Colo. 292. Incompetence of servant must be proximate cause of injury. *Burnos v. American Sugar Ref. Co.*, 107 App. Div. 286, 94 N. Y. S. 1104; *First Nat. Bk. v. Chandler*, 39 So. 822; *Brady v. Western Union Tel. Co.* [C. C. A.] 113 Fed. 909; *Princeton Coal & M. Co. v. Roll*, 162 Ind. 115 (intemperate, careless and frequently hoisted cage without signal); *First Nat. Bk. v. Chandler*, 39 So. 822 (question whether elevator boy was wide awake and attentive is admissible); *Burnos v. American Sugar Ref. Co.*, 107 App. Div. 286, 94 N. Y. S. 1104 (man had several times been found by foreman asleep and drowsy when awakened); *Delory v. Blodgett*, 185 Mass. 126 (engineer drank but no evidence that defendant knew it or that he drank to excess); *Austin v. Fisher Tanning Co.*, 96 App. Div. 550, 89 N. Y. S. 137 (failure to understand English. Risk assumed); *Date v. New York Glucose Co.*, 104 App. Div. 207, 93 N. Y. S. 249, 100 N. Y. S. 171 (failure to understand English—not negligence where work is simple); *White v. Lewiston & Y. F. R. Co.*, 94 App. Div. 4, 87 N. Y. S. 901 (one employe intemperate, the other habitually incompetent). Brakeman failed to flag train and there was some evidence that he had epileptic fits and that defendant knew it. Jury. "When the only claim of the incompetency is that the man in question is incompetent because he is careless and reckless, and inattentive, the fact that he never has been careless or reckless or inattentive, is a perfect answer to such a charge. But where the charge is that he, although in his natural condition a careful and attentive man, is afflicted with a disease the effect of which may at any moment make

him incompetent, it is for the jury to say whether it was negligent of the defendant to employ a man in such a condition, although up to that time there had been no failure to perform his duties." *Baird v. New York Cent. & H. R. R. Co.*, 64 App. Div. 14; aff. 172 N. Y. 637. Ohio Laws 1904, p. 72, forbids the employment as flagman hostler, or assistant hostler of one who cannot read, write and speak English.

p. 405, n. 126. *Weeks v. Scharer* [C. C. A.] 111 Fed. 330; *Allcot v. Kirkham*, 101 App. Div. 77, 91 N. Y. S. 775 (plaintiff complaining that S. was very careless and that he would not work with him, the foreman answered, "All right, you go ahead where you are." Jury could find this to be an admission and also an assurance that plaintiff would not have to work near S.)

p. 406, n. 127. *Cooney v. Commonwealth Ave. St. Ry. Co.* [Mass.] 81 N. E. 905; *The Elton* [C. C. A.] 142 Fed. 367 (proof of single act of incompetence insufficient to charge master); *Andrews v. Reiners*, 97 N. Y. S. 674 (that servant once or twice allowed barrels to roll down stairs, dropped some bottles, and cut his fingers and that defendant on these occasions was "somewhere on the floor" insufficient to charge defendant). Incompetence of servant may be proved by specific acts brought to master's notice or acts of such a character that master must have known of them. *First National Bk. v. Chandler*, 39 So. 822; *Date v. New York Glucose Co.*, 104 App. Div. 207, 93 N. Y. S. 249. Specific acts of negligence known or so notorious that they ought to be known to master are admissible in evidence; but not acts of negligence unknown to him. *Southern Pac. Co. v. Hetzer* [C. C. A.] 135 Fed. 272.

Section 90. Dangers Incidental to the Business.*

p. 406, n. 129. "The degree of safety secured to the servant cannot be the same in all lines of employment. After the master has exercised the reasonable care required of him by law the servant assumes the hazards peculiar to his particular line of employment. If the employment is in its nature dangerous, of course it is not to be expected that all those dangers will be eliminated by the exercise of the reasonable care required of the master by the law, and there will remain a certain amount of risk, varying in degree according to the dangerousness of the employment, to be assumed by the servant after the master has exercised the degree of care which the law says shall be the reasonable precaution demanded of masters in that particular line of business and gauged by the circumstances of the case." *Hansell-Elcock F. Co. v. Clark*, 214 Ill. 399; *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. "That by the common law a servant under his contract of employment impliedly assumes all the risks incident to the service in which he engages is a well settled principle under the law pertaining to master and servant. But such assumption does not include or embrace the hazard of extraordinary risks which are the result of the negligence of the master in failing to perform the duties enjoined upon him by law." Violation of statute. *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 76 N. E. 1060. "A servant by entering into his master's service, assumes all the risks of that service which the master cannot control, including those arising from the negligence

* 6 Curr. Law, 567.

of fellow-servants." *Gilman v. Eastern R. Corp.*, 10 Allen [Mass.] 233. "The measure of duty which rests upon those who are prosecuting a dangerous business which is intrinsically hazardous to human life, is not made so definite and clear by the authorities that a person can always readily determine from the facts of a given case whether injuries occur from the omission of some duty imposed upon the master, or from risks which are incident to the business and assumed by the servant. Employments which are carried on by the aid of machinery and the use of mechanical power, or the movement of large bodies, are generally either dangerous in themselves or are made so by the carelessness of those who are engaged in carrying them on. It may, we think, be laid down as a general rule that the dangers connected with such a business, which are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment and are assumed by those who consent to accept employment under such circumstances." *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280; *Pantzar v. Tilly Foster I. M. Co.*, 99 N. Y. 368; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Crown v. Orr*, 140 N. Y. 450; *Drake v. Auburn City R. Co.*, 173 N. Y. 466; *Wynkoop v. Ludlow Valve Mfg. Co.*, 98 N. Y. S. 1076; *Lynch v. American Linseed Co.*, 99 N. Y. S. 260. See New York Employers' Liab. Act 1902, c. 600, § 3, in Appendix and in § 117. An express messenger assumes the ordinary risks of his employment but these do not include the negligence of the railroad over which he is carried as a passenger in the course of his employ-

ment. *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59. Man on barge loading a steamer injured by hot water ejected from opening in side of steamer, which was not protected: not a risk of his employment. *Corrigan v. Oceanic Steam Nav. Co.* 14 Misc. 368, 94 N. Y. S. 19.

p. 407, n. 131. "When a servant of full age and sufficient intelligence enters into the employ of the master he is presumed to understand and therefore . . . voluntarily assumes, all the risks ordinarily incident to the business in which he engages." *Tucker v. Northern Term. Co.*, 41 Or. 82; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548. "The servant when he engages in the employment, does so in view of the risks incident to it: that he will be presumed to have contracted with reference to such risks and assumed the same, and that if he receives an injury resulting from the incidental risks and hazards ordinarily connected with the employment he cannot hold the master responsible." *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. See, also, *Crawford v. American S. & W. Co.* [C. C. A.] 123 Fed. 275. As to infants of tender years, see *infra*, § 98.

p. 407, n. 133. Risk of servants properly piling lumber is assumed. *Deye v. Lodge & S. M. T. Co.* [C. C. A.] 137 Fed. 480 (court). Bank of refuse which was being removed fell. Work had gone on there for some time before plaintiff was hired and defendant contended that if bank had become unsafe because of the previous negligence of fellow-servants he was not responsible. But held that the time the duty to plaintiff arose of furnishing a safe place was when he was

hired, and question of defendant's and plaintiff's negligence and whether plaintiff assumed the risk were for jury. *Simons v. Kirk*, 173 N. Y. 7.

p. 408, n. 136. Flagman in freight yard who also tends switches assumes risk of being run down while throwing switch by train backing in response to his signal. *Gilgan v. New York, N. H. & H. R. Co.*, 185 Mass. 139 (court). Car checker in yard killed by cars kicked on him without warning. Risk of working in a busy yard is assumed but if it is customary to give warning intestate had a right to rely on it and govern himself accordingly. *Meadowcroft v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 266. Plaintiff struck by kicked car. *Tucker v. Northern Term. Co.*, 41 Or. 82 (court).

p. 408, n. 139. Meeting of drawheads an incidental risk of coupling cars. *Hannigan v. Lehigh & H. R. R. Co.*, 157 N. Y. 244 (court). Jolts in coupling freight cars. *Clark v. New York Cent. & H. R. R. Co.*, 101 N. Y. S. 96 (court).

p. 409, n. 143. *Arnold v. President, etc., Delaware & H. C. Co.*, 125 N. Y. 15 (court).

p. 409, n. 144. *Gerstner v. New York Cent. & H. R. R. Co.*, 81 App. Div. 562, 80 N. Y. S. 1063; *Id.*, 178 N. Y. 627 (court).

p. 410, n. 145. *Gibson v. Erie R. Co.*, 63 N. Y. 449 (projecting roof of station. Court). Gates at crossing were out of repair and one was turned inward so that plaintiff running beside engine at night to make coupling hit it and was injured: he "assumed all the ordinary risks of the business, which included the risk

of injury from permanent structures erected for proper purposes at reasonable distances from the tracks, whether then in existence or erected afterwards" but the defendant had failed in its duty to keep the gates in repair and even if this construction existed when plaintiff entered the service it was not obvious. *Fearns v. New York Cent. & H. R. R. Co.*, 186 Mass. 529. Jury. See, also, *Drake v. Auburn City R. Co.*, 173 N. Y. 466.

p. 410, n. 146. *Pittsburgh, C. C. & St. L. Co. v. Parish*, 28 Ind. App. 189 (Branches of trees permitted to hang low over track not an incidental risk. Jury).

p. 410, n. 149. *Patton v. Southern R. Co.* [C. C. A.] 111 Fed. 712.

p. 410, n. 150. *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211 (court).

p. 410, n. 151. Dummy engine remaining on temporary track used in construction of reservoir toppled over. Risks of operating over track not fully ballasted might be assumed but some evidence here of master's negligence and case for jury. *Hoelter v. McDonald*, 82 App. Div. 423, 81 N. Y. S. 616.

p. 410, n. 152. Train derailed by rough track: risk not assumed where it was run at high speed. *Rickerd v. Chicago, St. P. M. & O. R. Co.* [C. C. A.] 141 Fed. 905. Jury. Work train derailed when running at high speed with locomotive backwards. *Southern Ind. R. Co. v. Messick*, 35 Ind. App. 676.

p. 411, n. 156. Brakeman standing in obedience to orders on icy roof of car injured by sudden jerk of train. *Texas & P. R. R. Co. v. Behymer*, 189 U. S. 468.

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Jury. Sudden stopping by emergency instead of service brake. *Benedict v. Chicago G. W. R. Co.* [Mo. App.] 78 S. W. 60. Jury.

p. 411, n. 158. Log rolled from car on logging railroad. *Williams v. Northern Lumber Co.*, 113 Fed. 382 (court); *Walsh v. Smith*, 26 R. I. 554 (court); *Boyer v. Eastern R. Co.*, 87 Minn. 367 (court). Fireman standing with one foot on engine and one on tender injured by their parting owing to chains between them being disconnected. *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. Jury. End of switch on trestle had no bumper. *Pennsylvania R. Co. v. Jones* [C. C. A.] 123 Fed. 753. Jury. Riding on engine to sand track. *Creola Lumber Co. v. Mills*, 42 So. 1019. Court. Flying cinders. *Duree v. Chicago, M. & St. P. R. Co.*, 118 Iowa, 640. Court.

p. 412, n. 164. Deckhand hurt by kink in hawser. *The Troy*, 121 Fed. 901. Court. Seaman on yacht hurt by explosion of loaded cannon while he was cleaning it not knowing it was loaded. *Sievers v. Eyre*, 122 Fed. 734. Court. Bargeman loading coal into a steamer injured by hot water discharged from opening in steamer's side and not protected though guard had been furnished. *Corrigan v. Oceanic Steam Nav. Co.*, 14 Misc. 368, 94 N. Y. S. 19. Jury.

p. 412, n. 165. Where the defendant does not undertake the duty of inspecting poles to discover their condition, but leaves the matter to the lineman the latter assumes the risk of an old or rotten pole falling as an incident to the business which he must guard against as best he can. *Tanner v. New York, N. H. & H. R. Co.*, 180 Mass. 572 (here a foreman was present whom

plaintiff, engaged in transferring wires from old poles to new, asked if he should cut a guy wire and on the superintendent's telling him to do so the pole fell: the order was not an assurance of safety. Court). *Lord v. Inhabitants of Wakefield*, 185 Mass. 214 (here a foreman ordered plaintiff, not an experienced lineman to ascend a pole, and the plaintiff feeling it tremble asked whether it would not better be guyed but foreman said pole was all right: order was an assurance of safety and plaintiff neither knew nor was bound to know that this was an old pole. Jury). *Little v. Hyde Park El. L. Co.*, 191 Mass. 386 (spike came out of the pole as plaintiff climbed it owing to decayed condition—spikes frequently became loose and defendant assumed no duty of inspection. Court); *Evansville, G. & E. L. Co. v. Raley* [Ind. App.] 76 N. E. 548 (defendant assumed no duty of inspection—plaintiff bound to know life of pole was limited and might be unsound. Court); *Adams v. Central Ind. R. Co.* [Ind. App.] 78 N. E. 687 (plaintiff removing wires from old pole when it fell: he did not rely on any inspection by master but undertook to make it himself. Court); *Kellogg v. Denver City Tram. Co.*, 18 Colo. App. 475 (plaintiff failed to brace pole, and did not rely on any inspection by master. Court); *Leach v. Central N. Y. Tel. Co.*, 81 App. Div. 637, 80 N. Y. S. 1037 (plaintiff removing wire from old pole cut guy wire: he knew condition of pole. Court); *Rowley v. American Ill. Co.*, 83 App. Div. 609, 81 N. Y. S. 1099 (question for jury whether defendant had made reasonable inspection to discover condition of pole); *Flood v. Western Union Tel. Co.*, 131 N. Y. 603 (experienced lineman hurt by breaking

of arm of telegraph pole. Though company inspected an inspection would not disclose defect and lineman had to rely on his own judgment. Court); *Walsh v. New York & Q. Co. R. Co.*, 80 App. Div. 316, 80 N. Y. S. 767; *Id.*, 178 N. Y. 588 (wires being changed from wooden to iron poles: wooden pole fell when wire was cut because of dry rot. Defendant should have inspected and change was not notice of defect. Jury). *Western Union Tel. Co. v. Tracy* [C. C. A.] 114 Fed. 282 (jury, affirms 110 Fed. 103); *Cumberland Tel. & Tel. Co. v. Bills* [C. C. A.] 128 Fed. 272 (duty of defendant to inspect and question for jury whether duty of inspection or warning performed); *Britton v. Central Union Tel. Co.* [C. C. A.] 131 Fed. 844 (if defendant assumed no duty of inspection, the lineman would assume risk of climbing decayed pole); *Adams v. Central Ind. R. Co.* [Ill.] 78 N. E. 687 (lineman changing wires from old to new poles and not relying on inspection by employer but making such inspection himself cannot recover for breaking of pole under ground); *Barto v. Iowa Tel. Co.* [Iowa] 101 N. W. 876 (telephone lineman did not assume risk of finding live electric light wires strung on poles, having no duty to inspect and not knowing of the condition). Master's duty as to telegraph poles, see *Riker v. New York O. & W. R. Co.*, 64 App. Div. 357, 72 N. Y. S. 168.

p. 413, n. 167. A telephone operator assumed "the ordinary risks of nervous annoyance and irritation that might be reasonably connected with the performance of her duties, but this did not include shocks from electric current which could be found to have caused pronounced bodily prostration, even if the degree of

voltage was not sufficiently high to endanger life.” *Cahill v. New Eng. Tel. & Tel. Co.* [Mass.] 79 N. E. 821. See, also, *Chicago Tel. Co. v. Schultz*, 121 Ill. App. 573. Pin driven in pole came out and caused lineman to fall. *Chisholm v. New Eng. Tel. & Tel. Co.*, 185 Mass. 82 (jury). “Trouble finder” hurt by live wire. *Bell Tel. Co. v. Detharding* [C. C. A.] 148 Fed. 371. Court.

p. 413, n. 168. Fall of rock after blast in quarry. *Trapasso v. Coleman*, 74 App. Div. 33, 76 N. Y. S. 798 (court). Fall of slate in mine. *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546 (court). Fall of rock in quarry. *Roytio v. Litchfield* [C. C. A.] 113 Fed. 240 (court). Risk of rocks flying from blast is a risk assumed only after defendant has used due care. *Rockport Granite Co. v. Bjornholm* [C. C. A.] 115 Fed. 947 (jury). Stone while being moved by derrick broke because of seam. *Bedford Quarries Co. v. Turner* [Ind. App.] 75 N. E. 25 (court). Danger that stone placed by fellow-servants beside track in quarry might fall is an incidental risk. *Smallwood v. Bedford Quarries Co.*, 28 Ind. App. 692 (court). Dynamite left in stone exploded when struck by plaintiff. Superintendent had examined stone and said it was all right. Not an incidental risk. *Di Stefano v. Peekskill L. R. Co.*, 107 App. Div. 293, 95 N. Y. S. 179 (jury). Fall of stone from roof of mine. Statute was violated. Not an incidental risk. *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 76 N. E. 1060 (jury). Correct in note *Hull v. Bedford Quarries Co.* to *Stone v. Bedford Quarries Co.*, 156 Ind. 432 (court).

p. 413. Construction of buildings. One of several
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iron columns fell on plaintiff while he was at work elsewhere: not an incidental risk. *Hansell-Elcock F. Co. v. Clark*, 214 Ill. 399 (jury).

p. 414, n. 171. While furnace for melting lead was in operation master attempted to remove water block and an explosion occurred: not an incidental risk: such a condition would seldom occur. *National Steel Co. v. Lowe* [C. C. A.] 127 Fed. 311 (jury). Sliver flew from head of old punch when struck by hammer: this was a common happening. *Cincinnati H. & D. R. Co. v. Phinney* [Ind. App.] 77 N. E. 296 (court). Knife flew out of revolving cylinder of moulding machine owing to breaking of bolt about which there was no evidence. *Moran v. Mulligan*, 110 App. Div. 208, 97 N. Y. S. 7 (court). Handle of milk can came off. *Schapiro v. Levy*, 101 App. Div. 444, 91 N. Y. S. 1044 (court). Fall of grain in elevator not an incidental risk. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280 (jury); *Lynch v. American Linseed Co.*, 99 N. Y. S. 260 (jury). Wire flew from carpet loom. *Daly v. Smith & Sons C. Co.* [N. Y.] 69 Hun, 77. Court. Repair man hurt by defective boiler that he was testing. He sued not his master but the owner of the boiler. *Olive v. Whitney Marble Co.*, 103 N. Y. 292 (court).

Section 91. Transitory Risks.*

p. 415. "It is a risk of operation and not of construction or provision and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and

* 6 Curr. Law, 567.

not that of the master who furnishes them." The master's duty does not extend to making or keeping a place safe where the work is to make a safe place dangerous or an obviously dangerous place safe. *American Bridge Co. v. Seeds* [C. C. A.] 144 Fed. 605. The rule as to transitory risks applies only to temporary conditions and not where the instrumentalities are originally defective or become so for want of repair. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21. Although plaintiff may be employed in making a dangerous place safe yet defendant still has the duty of not exposing the servant to risks that may be guarded against. *Martin v. Des Moines, Edison L. Co.*, [Iowa] 106 N. W. 359.

p. 417, n. 174. Plaintiff sent to clean out unused room and injured by defective floor. *O'Keeffe v. John P. Squires Co.*, 188 Mass. 210 (court). Foreman getting room ready for occupancy and knowing that machinery is old, hurt by set screw. *Archibald v. Cygolf Shoe Co.*, 186 Mass. 213 (court). Repairing washouts on track. *Vaughn v. California C. R. Co.*, 83 Cal. 18. Plaintiff sent into trench to brace sides when it caved. *City of Greeley v. Foster*, 32 Colo. 292 (court). Plaintiff sent to remedy dangerous condition in mine and hurt by fall of slate. The mining statute does not protect him for the only way of obeying it is by employing servants to make place safe. *Indiana & C. C. Co. v. Batey*, 34 Ind. App. 16 (court). Plaintiff employed to look after condition of mine hurt by fall of slate while taking out props. *Jennings v. Ingle*, 35 Ind. App. 153 (court). "Trouble finder" hurt by live wire. *Bell Tel. Co. v. Detharding* [C. C. A.] 148 Fed. (215)

371 (court). Plaintiff removing embankment which had fallen on track when rocks from above fell on him. *Van Derhoff v. New York Cent. & H. R. R. Co.*, 88 App. Div. 418, 84 N. Y. S. 650 (court). Plaintiff attempting to guard against fall of bank was injured by its falling. "It would be an anomalous condition of affairs which would impose upon the master, as a consequence of his efforts to safeguard his employes, liability for an injury resulting to one of them from the very danger which he was seeking to avoid and which was perfectly apparent to the person attempting to remedy the same." *Batty v. Niagara Falls, H. P. & Mfg. Co.*, 79 App. Div. 466, 79 N. Y. S. 734 (court). Roof of mine fell and plaintiff engaged in clearing out room was struck by falling rock. *Moon-Anchor Consol. S. Min. Ltd. v. Hopkins* [C. C. A.] 111 Fed. 298 (court). Plaintiff employed to timber mine and remedy dangers from caving struck by falling coal. *Roccia v. Black Diamond C. Min. Co.* [C. C. A.] 121 Fed. 451 (court). Plaintiff clearing up landslide struck by rock. *Florence C. C. R. Co. v. Whipps* [C. C. A.] 138 Fed. 13 (court). Repairing bridge on washed out track. *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Or. 450.

p. 417, n. 175. Temporary floor in building being erected broke. *Fournier v. Pike*, 128 Fed. 991 (court). Space in bridge being built left uncovered. *American Bridge Co. v. Seeds* [C. C. A.] 144 Fed. 605 (court). Plaintiff taking down joist injured by pulling out truss which had not yet been fastened securely. *McElwaine-Richards Co. v. Wall* [Ind.] 76 N. E. 408 (court). Gallery being built fell. *McDonough v. Clonbrook Steam Boiler Co.*, 99 N. Y. S. 263 (court). Brick dropped by

masons. *Roth v. Eccles*, 28 Utah, 456 (court). Overhanging end of loose plank tipped when plaintiff stepped on it. *Thompson-Starrett Co. v. Fitzgerald* [C. C. A.] 149 Fed. 721. Court.

p. 417, n. 177. Ignorant plaintiff poured iron into damp mould. *Hustin v. National Foundry Co.*, 106 App. Div. 152, 94 N. Y. S. 101 (jury).

p. 417, n. 178. Hole in floor of car used as a passageway. *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21 (jury).

p. 419, n. 181. Ladder slipped causing hammer to fall. *Fay v. Wilmarth*, 183 Mass. 71 (court). Lights went out owing to breaking of engine and plaintiff slipped while going down dark passageway. Darkness a transitory risk. *Donovan v. American Linen Co.*, 180 Mass. 127 (court). Servant took naphtha to clean tank. It was not provided for that purpose. Explosion. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375 (court). Striking unexploded hole knowing one was somewhere. *Davis v. Trade Dollar Consol. Min. Co.* [C. C. A.] 117 Fed. 122 (court). Striking missed hole: plaintiff bound to examine for himself. *Poorman Silver Mines of Colo. v. Devling*, 81 P. 252 (court). Electric shock while altering switchboard. *Martin v. Des Moines Edison L. Co.* [Iowa] 106 N. W. 359 (jury).

Section 92. Dangers Arising from the Condition of Affairs.*

p. 422, n. 185. *Sweeney v. Berlin & Jones Envel. Co.*, 101 N. Y. 520; *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. S. 49.

* 6 Curr. Law, 568.

p. 422, n. 186. "The defendant had the right to use that structure before it was completely planked over. It could ask its employes to continue cleaning its cars at that yard before the planking was completed, and if with full knowledge of that fact the employes should consent to do the work at that place they would assume the risk consequent thereon." *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288. See, also, *McLeod v. New York, N. H. & H. R. Co.*, 191 Mass. 389.

p. 423, n. 187. Servant takes risk of premises and machinery as he finds them when accepting employment. *Moyle v. D. S. McDonald Co.*, 188 Mass. 499 (defective elevator guides: "this assumption covered only obvious dangers, whether of exposed and unguarded machinery, or a particular method of carrying on business, or arising from the ways, works, or machinery being out of repair." *Boy. Jury*). *Wolfe v. New Bedford Cordage Co.*, 189 Mass. 591 (court); *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338 (unguarded emery wheel. Court). "An employe of sufficient age and experience is chargeable with knowledge of the ordinary conditions under which the business is conducted and its ordinary risks and hazards, and will be presumed to have notice of and to have assumed all such risks and hazards which to a person of his experience are, or ought to be, patent and obvious." *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. Things known or knowable by the exercise of reasonable caution and observation are assumed. *Atchison, T. & S. F. R. Co. v. Bancord* [Kan.] 71 P. 253. Hole in floor: whether it had been covered over before plaintiff went to work there is immaterial. *McCafferty v. Le-*

wando's F. D. & C. Co. [Mass.] 80 N. E. 460. If risk is assumed there can be no recovery even if safe places are furnished for a similar work elsewhere. Koepcke v. Wisconsin B. & I. Co., 116 Wis. 92. If he chooses to enter a dangerous employment he takes the risk though the master might have avoided the danger. Foley v. Jersey City El. Co., 54 N. J. Law, 411. Acceptance of employment shows willingness to assume risk. Dunkerley v. Webendorfer Mach. Co., 58 A. 94. "The legal presumption is that in assuming the duties of his employment he assumed the risks so far as reasonable diligence on his part could discover them." Evansville, G. & E. L. Co. v. Raley [Ind. App.] 76 N. E. 548. Where the servant was an adult of ordinary intelligence, "the servant accepts all the ordinary risks incidental to the employment in which he engages: not only those which are known to him, but also those which are readily discernible. He is presumed to have known and appreciated all such risks as were open and obvious to ordinary apprehension. He does not impliedly agree to accept non-obvious latent risks in the absence of instruction or information in respect to them." Crawford v. American S. & W. Co. [C. C. A.] 123 Fed. 275. "A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation. . . . Among the risks and dangers thus assumed are those which arise from a failure of the master to completely discharge his

duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use." *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495. "The servant when he enters into the relation, assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law imposes upon him the duty of self-protection and always assumes that the instinct, so deeply rooted in human nature, will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. He is bound to take notice of the operation of familiar laws and to govern himself accordingly, and if he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master." *Crown v. Orr*, 140 N. Y. 450. He assumes "the risks and perils incident to the use of the machinery and property of the defendant as it then was, so far as such risks were

apparent." *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. 129, Aff. 56 N. Y. 608; *De Forest v. Jewett*, 88 N. Y. 264; *Maltby v. Belden*, 167 N. Y. 307; *Drake v. Auburn City R. Co.*, 173 N. Y. 466; *Mullen v. Metropolitan St. R. Co.*, 89 App. Div. 21, 85 N. Y. S. 134; *McLoughlin v. Manhattan R. Co.*, 111 App. Div. 254, 97 N. Y. S. 719. *Holshouser v. Denver, G. & E. Co.*, 18 Colo. App. 431. (Defendant hired plaintiff knowing that he might be injured by strikers, of which plaintiff was ignorant, and failed to warn him. Defendant liable.) Servant of independent contractor using employer's apparatus, takes it as he finds it. *Sullivan v. New Bedford, G. & E. L. Co.*, 190 Mass. 288. See *Wagner v. Boston El. R. Co.*, 188 Mass. 437.

p. 425, n. 188. *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20. See, also, *Sweeney v. Berlin & Jones Envel. Co.*, 101 N. Y. 520; *Hannigan v. Smith*, 26 App. Div. 176, 50 N. Y. S. 845.

Section 93. Dangers Known to Servant.*

p. 426, n. 194. *Johnson v. Boston & M. R. Co.* [Vt.] 62 A. 1021 (low bridge. Court); *Haskins v. New York Cent. & H. R. R. Co.*, 65 Barb. 129, 56 N. Y. 608 (no warning of moving trains. Court); *Chicago, M. & St. P. R. Co. v. Voelker* [C. C. A.] 129 Fed. 522 (kicking cars without warning. Court); *Johnson v. Southern Pac. R. Co.*, 117 Fed. 462; *Id.*, 196 U. S. 1 (absence of automatic couplers in violation of statute. Court); *Chambers v. Chester*, 172 Mo. 461 (grade of powder

* 6 Curr. Law, 568.

changed. Court). Incompetent servants. *White v. Lewiston & Y. F. R. Co.*, 94 App. Div. 4, 87 N. Y. S. 901 (court); *Austin v. Fisher Tanning Co.*, 96 App. Div. 550, 89 N. Y. S. 137 (court); *Hull v. Northern Pac. R. Co.* [C. C. A.] 136 Fed. 153 (court); *Indianapolis & G. R. Trans. Co. v. Foreman*, 162 Ind. 85 (court); *Bowles v. Indiana R. Co.*, 27 Ind. App. 672 (vicious horse. Court); *Schwartz v. Cornell*, 13 N. Y. S. 355 (open hole. Court); *Shields v. Robins*, 3 App. Div. 582 (uncovered elevator. Court); *Horrigian v. New York Cent. & H. R. R. Co.*, 7 App. Div. 377 (defective derrick car. Court). *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. S. 148 (uncovered blast. Court); *Langley v. Wheelock*, 181 Mass. 474 (pile of steel bars fell. Court); *Zerin v. Goldman*, 94 N. Y. S. 35 (dangerous machine. Court); *American Linseed Co. v. Heins*, 141 Fed. 45 (unguarded drum in violation of statute. Court); *Mull v. Curtice Bros. Co.*, 74 App. Div. 561, 77 N. Y. S. 813 (defective shipper. Court); *Alvey v. American Writing Paper Co.*, 184 Mass. 234 (iron pipe on loose joint would fly up when steam turned into it. Court); *Sweeney v. Berlin & Jones Envel. Co.*, 101 N. Y. 520 (old embossing machine. Court); *Roche v. India Rubber & G. P. I. Co.*, 100 N. Y. S. 1009 (rubber rolling machine when operated could be stopped only by shutting off power: hand caught in rolls as he was cutting rubber. Court); *Show v. Manchester St. R. Co.* [N. H.] 58 A. 1073 (conductor knowing that there were too few cars remained at work. Court).

p. 428, n. 195. *McKenna Steel Working Co. v. Lewis* [C. C. A.] 111 Fed. 320 (placing skid between car and platform. Court); *Daily v. Fiberloid Co.*, 186

Mass. 318 (twisted and unsteady runway which plaintiff sometimes braced. Court); Gurney v. Le Baron, 182 Mass. 368 (plaintiff had helped build temporary floor but did not know a spliced upright which later broke was used. Jury); Wingert v. Krakauer, 76 App. Div. 34, 78 N. Y. S. 664 (helped to build scaffold but ignorant as to its security. Jury); Boucher v. Robeson Mills, 182 Mass. 500 (old belt broke: it was plaintiff's duty to look after the belts temporarily but he did not reach it in the course of his work until he was called upon to fix it when it broke: he was not careless in not previously inspecting and knowing its condition. Jury); Brundige v. Dodge Mfg. Co., 183 Mass. 100 (plaintiff told to true wheel on a platform built by himself and with a tool furnished by himself. Court); Jacobson v. Favor [Mass.] 78 N. E. 763 (painter using an extension ladder as a staging. Court); Hughes v. Schnavel, 20 Colo. App. 306 (plaintiff saw simple scaffold built, helped place it and shifted it. Court); Kindorf v. Hoelleser, 87 App. Div. 628, 84 N. Y. S. 465 (coach driver helped repair elevator without defendant's knowledge. Court); Baker v. Empire Wire Co. 102 App. Div. 125, 92 N. Y. S. 355 (plaintiff's duty to replace cleats on gangway, he slipped because of defect in them. Court); Harvey v. McConchie, 77 App. Div. 361, 79 N. Y. S. 241; *Id.*, 177 N. Y. 569 (staging. Court); Salem Bedford Stone Co. v. Hobbs, 11 Ind. App. 27 (stone in quarry improperly placed slipped on servant whose duty was to place stones. Court); Kelley v. Chicago & A. R. Co., 105 Mo. App. 365 (leaky locomotive lights which it was plaintiff's duty to inspect. Court).

Section 94. Reasonable Care to Discover Dangers.*

p. 429, n. 197. An employe is "presumed to have notice of and to have assumed all such risks and hazards which to a person of his experience are, or ought to be, patent or obvious. If a defect is so plain and obvious to the senses that in the exercise of ordinary care the employe would discover it, and he continues in the employment without complaint and without any assurance by the master that the defect will be repaired or the danger removed, he assumes the risk arising from it." *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. He assumes "the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation." *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495. Pile of lumber obviously defective but plaintiff did not notice it. *Hull v. Northern Pac. R. Co.* [C. C. A.] 136 Fed. 153 (court). Plaintiff a seaman on a yacht guilty of negligence in not examining cannon to see whether it was loaded before attempting to clean it. *Sievers v. Eyre*, 122 Fed. 734. Plaintiff is bound to use his eyes but need not make a critical examination. *Choctaw O. & G. R. Co. v. Holloway*, 191 U. S. 334. "The true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly discoverable by the employe." *Choctaw O. & G. R. Co. v. McDade*, 191 U. S. 64. Servant need not have actual

* 6 Curr. Law, 571.

knowledge but must use his senses to detect danger. *Southern Ind. R. Co. v. Moore*, 29 Ind. App. 52. "The legal presumption is that in assuming the duties of his employment he assumed the risks so far as reasonable diligence on his part could discover them." *Evansville, G. & E. L. Co. v. Raley* [Ind. App.] 76 N. E. 548. "He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master." *Crown v. Orr*, 140 N. Y. 450; *Maltbie v. Belden*, 167 N. Y. 307; *Wingert v. Krakauer*, 76 App. Div. 34, 78 N. Y. S. 664. "He may not close his eyes to obvious and dangerous conditions and expect to recover in case of accident. If accident comes, and he pleads ignorance, he must show his ignorance was not only actual but excusable." *Williams v. Choctaw O. & G. R. Co.* [C. C. A.] 149 Fed. 104.

p. 433, n. 206. "It is common knowledge that clothes or any other flexible material or article that comes in contact with a revolving pulley or shaft is liable to get caught and wound around it." *Lennon v. Goodrich* [Mass.] 78 N. E. 421. 4

p. 435, n. 209. Other workmen were asked if a man's hand could be caught if box were over gears. This was not a question for an expert but was admissible as a convenient way of describing the machine. *Gomes v. New Bedford Cordage Co.*, 187 Mass. 124.

p. 435. Obvious to one of the plaintiff's capacity. *Avery v. Nordyke-Marmon Co.*, 34 Ind. App. 541. "As the operating machinery (of a jolting elevator) was not visible, the plaintiff by his contract of em-

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ployment assumed only those risks that were open and obvious, even if his mechanical knowledge had been such that upon a view of the hoisting machinery he would have appreciated the danger." *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580.

Section 95. Obvious Dangers.*

p. 432, n. 201. "He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly, and if he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master." *Crown v. Orr*, 140 N. Y. 450; *Montgomery Coal Co. v. Barringer* [Ill.] 75 N. E. 900. "Which he must have known had he exercised ordinary care and observation." *Williams v. Delaware L. & W. R. Co.*, 116 N. Y. 628. "An obvious danger is one which would have been seen and observed by a reasonably prudent man." *James Ramage Paper Co. v. Bulduzzi* [C. C. A.] 147 Fed. 151; *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492. Risks "so plain and certain." *Lynch v. American Linseed Co.*, 99 N. Y. S. 260. "Plainly observable by him." *Lindsay v. New York, N. H. & H. R. Co.* [C. C. A.] 112 Fed. 384. "The danger was not of such a character as to require a skilled mechanic or an expert to detect it." *Devoe v. New York, Cent. & H. R. R. Co.*, 70 App. Div. 495, 75 N. Y. S. 136. A danger may be obvious though plaintiff did not notice it. *Hull v. Northern Pac. R.*

* 6 Curr. Law, 568.

Co. [C. C. A.] 136 Fed. 153. Or though he is hurt the first time he comes in contact with it. *Sullivan v. New Bedford, G. & El. Co.*, 190 Mass. 288. One cannot say he did not know obvious dangers. *Glenmont Lumber Co. v. Roy* [C. C. A.] 126 Fed. 524; *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495, citing many cases of obvious dangers. Although plaintiff testifies that he did not know there was danger court may find that he did. *Cripple Creek S. & O. Co. v. Sousa*, 86 P. 1005; *Dulfer v. Brooklyn Heights R. Co.*, 101 N. Y. S. 207. Where plaintiff testified that he did not know, although he had been long employed, that no rules had been established as to the moving of a locomotive by an engineer when plaintiff was under it, the court cannot say that he must have known and assumed the risk of such omission. *Lane v. New York, Cent. & H. R. R. Co.*, 107 App. Div. 166, 94 N. Y. S. 988. And see *supra*, § 94.

p. 439, n. 211. Objects near track. Brakeman running at night alongside engine injured by gates at crossing, one of which was out of repair and bent inward toward track. This condition was not obvious and he did not assume it even if it existed when he entered the employment. *Fearns v. New York Cent. & H. R. R. Co.*, 186 Mass. 529 (jury). Brakeman of railroad company when passing over defendant's track in defendant's yard was crushed between his car and a pile of rattan. Defendant piled goods in this yard where accident happened, and goods were loaded by defendant's servants on train. Plaintiff had gone into yard daily for six months. The yard was usually crowded and it was usual to store rattan at this spot.

He was on a broad car and could have seen pile had he looked. *Flansberg v. Heywood Bros. & W. Co.*, 190 Mass. 125 (court). Brakeman standing on step of flat car struck by building, which had been there many years, standing 2 ft. 7 in. from track. When employed he was inexperienced on railroads. He had worked a week. On first day he had worked in yard and gone by the building. He had been by it six times on day of the accident. "There are a number of cases in this commonwealth where it has been held that a railroad employe takes the risk of permanent structures near the track, at least when they are not unusually near, leaving open the question whether the risk is assumed if the structure is unusually near. In some of the opinions the statement might be thought to go further, but with the exception of *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484, we do not think that it does. The question left open is now before us for decision, and we are of opinion that the qualification is not material, and that the employe assumes the risk even if the structure in question is unusually near to the track. When the defendant invited the plaintiff's intestate to work for it, the invitation given was an invitation to work on defendant's railroad as then constructed. In inviting him to work for it the defendant did not come under an obligation to rebuild its tracks and buildings and make them more safe; but the plaintiff's intestate undertook to work on the defendant's railroad as then constructed, and so took the risk of all obvious dangers, including the danger of the proximity of a building to the defendant's tracks, although it was unusually near to them.

As is pointed out by defendant's counsel, no similar limitation has been laid down in the employment of a workman in other occupations. For these reasons the case of *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484, cannot in our opinion be upheld." *McLeod v. New York, N. H. & H. R. Co.*, 191 Mass. 389 (court). Brakeman mounting car struck by car left on side track by conductor. *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46 (jury). Brakeman stood so near moving train that door of car caught his clothes. *Chicago I. & L. R. Co. v. Bryan* [Ind. App.] 75 N. E. 678 (court). Brakeman while leaning out struck by bridge of standard width. Had been by daily for three months. *Cleveland, C. C. & St. L. R. Co. v. Haas*, 35 Ind. App. 626 (court). Brakeman mounting cab struck by switch target located too near track. Had passed it five or six times. Mere knowledge that it was too near not enough: he must also have known and appreciated danger. *Wright v. Chicago, I. & L. R. Co.*, 160 Ind. 583 (jury). Yard switchman struck by car on side track: might assume that tracks were far enough apart. *Baltimore & O. S. R. Co. v. Roberts*, 161 Ind. 1 (jury). Trolley poles erected 3 ft. 4 in. from rail and plaintiff hit one of them. He had been over track on front of engine. *North Birmingham St. R. Co. v. Wright*, 130 Ala. 419 (court). Brakeman leaning out to look at hot box struck by stock gap too near track. *Northern Ala. R. R. Co. v. Mansell*, 138 Ala. 548 (jury). Fireman on dark snowy night struck mail crane placed no nearer than others along track. He had passed similar cranes 120 times and this one 83 times and had been on road for a year. *Kenny v. Meddaugh* [C. C. A.] (229)

118 Fed. 209 (court). Switch stand placed so near track that handle could strike steps of passing passenger car. Chicago, M., St. P. R. Co. v. Riley [C. C. A.] 145 Fed. 137 (jury). Switch target hit plaintiff as he climbed up side of car. Its position had been recently changed and he testified that he did not know and had not been warned of it. Boston & M. R. Co. v. Gokey [C. C. A.] 149 Fed. 42. Scale box 2 ft. distant from side of freight car. It was in yard where plaintiff had worked 7 or 8 days. He was hanging on side of car looking for signal when hurt. He did not know how near it was but box could be seen. Texas & P. R. Co. v. Swearingen, 122 Fed. 193; Id., 196 U. S. 51 (jury). Street railway conductor struck tree near track by which he had passed 160 times as conductor and 50 times as motorman. "It is often a close question to determine whether a single obstruction, located too near the track of a railroad, causing the death of an employe on a passing train, is or is not an obvious risk that he assumed. In the case before us no such difficulty is presented. The intestate when passing over this road frequently, was fully advised as to the proximity of the trees, and if in his opinion, there was peril in operating an open car, it was his duty to have retired from the employment." Drake v. Auburn City R. Co., 173 N. Y. 466. At a particular point in 7 mile street railway track the tracks were so near that running boards of cars would overlap. Plaintiff had passed over place twelve or fifteen times a day for a month. He had not been warned. When collecting fares and standing on running board he was struck by approaching car (jury). True v. Niagara Gorge R.

Co., 70 App. Div. 383, 75 N. Y. S. 216; *Id.*, 175 N. Y. 487. Mail crane twelve inches distant—no negligence of defendant. *Sisco v. Lehigh & H. R. R. Co.*, 145 N. Y. 296. See *Brown v. New York Cent. & H. R. R. Co.*, 42 App. Div. 548, 59 N. Y. S. 672 (mail crane within seven inches, jury); *Benthin v. New York Cent. & H. R. R. Co.*, 24 App. Div. 303, 48 N. Y. S. 503 (telegraph pole slanting to within a few inches from track). Fireman struck by mail crane 13 to 20 inches nearer than necessary. *Denver & R. G. R. Co. v. Burchard* [Colo.] 86 P. 749 (jury). Brakeman crushed between car and cattle chute. This was the only one so near the track but he was familiar with the location. *Wilson v. Lake Shore & M. S. R.* [Mich.] 108 N. W. 1021 (court). Telegraph pole near and bending toward tracks. Plaintiff had passed it three times and then on top of car. *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226 (jury). Knowledge of a structure too near track is not presumed from fact that plaintiff passed it but once, and then in the dark when he was looking for obstructions on track. *Gorham v. Sioux City Stockyards Co.*, 118 Iowa, 749 (jury). Risk of piles of lumber too near track in an unfamiliar lumber yard, not assumed by switchman. *Bradburn v. Wabash R. Co.* [Mich.] 96 N. W. 929 (jury).

p. 440, n. 211. Low Bridges. Branches of trees permitted to hang low over track. Plaintiff had been by 7 times. *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189 (jury). Brakeman struck by low bridge under which he had passed 5 times in daylight and he had been warned twice. *Hollingsworth v. Chicago, I. & L. R. Co.*, 160 Ind. 259 (court). Con-

ductor struck by projecting roof of station. He lived near by and had passed over road daily for many years. *Gibson v. Erie R. Co.*, 63 N. Y. 449 (court). Brakeman struck by low bridge under which he had passed daily for three weeks and he had previously been under it as fireman. *Williams v. Delaware, L. & W. R. Co.*, 116 N. Y. 628 (court). Absence of telltale must have been known to brakeman who had passed under bridge for three months. *Ryan v. Long Island R. Co.*, 51 Hun, 607 (court). Where, although brakeman knows of bridge, his attention is diverted by his duties and there was no telltale as customary on bridges, it was held that he might recover. *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302 (jury). Brakeman setting brakes on furniture car struck by roof of freight house 1 ft. 8 in. above that car or 3 ft. 8 in. above ordinary car. Had been in yard twenty or twenty-five times but never under roof. *Hawley v. Chicago, B. & Q. R. Co.* [C. C. A.] 133 Fed. 150 (jury). Brakeman struck by trestle 3½ ft. above car. Had been several times over road and was an experienced man. Had never been on top of car at this place before. *Pittsburgh, S. & N. R. Co. v. Lamphere* [C. C. A.] 137 Fed. 20 (jury). Brakeman on a car higher and wider than ordinary cars struck by spout of water tank which cleared ordinary car by less than 6 ft. Had passed over road a few times, sometimes at night. *Choctaw, O. & G. R. Co. v. McDade*, 112 Fed. 888; *Id.*, 191 U. S. 64 (jury). Brake-man struck by low bridge first time he went under it. *Miller v. Boston M. R. Co.* [N. H.] 61 A. 360 (jury).

p. 441, n. 211. Tracks. Brakeman employed in yard nine months fell in one of 118 drains there. *Lind-*

say v. New York, N. H. & H. R. Co. [C. C. A.] 112 Fed. 384 (court). Heavy storm caused landslide. Merchante Trust Co. v. Pittsburgh & W. R. Co. [C. C. A.] 115 Fed. 475 (jury). Track on trestle had no bumper at end: plaintiff had been there six or seven times. Pennsylvania R. Co. v. Jones [C. C. A.] 123 Fed. 753 (jury). Foreman of switch crew injured by low joints of rails. Chicago, M. & St. P. R. Co. v. Benton [C. C. A.] 132 Fed. 460 (jury). Brakeman hurt by open culverts long in existence. Southern Pac. Co. v. Gloyd [C. C. A.] 138 Fed. 388 (court). Brakeman employed four years stepped into drain in yard newly cleaned out as was customary. Haggerty v. Chicago, M. & St. P. R. Co. [C. C. A.] 141 Fed. 966 (court). Track on steep grade not sanded as usual: night dark. Union Trac. Co. v. Buckland, 34 Ind. App. 420 (jury). Defective safety device on spur track to prevent cars running on to main track. Grand Trunk W. R. Co. v. Melrose [Ind.] 78 N. E. 190 (jury). Unfinished track being used and brakeman injured by projecting tie. Southern R. Co. v. Howell, 135 Ala. 639 (jury). Unsound ties and light rails caused derailment. Jackson Lumber Co. v. Cunningham, 141 Ala. 206 (jury). Unsound ties. Northern Ala. R. Co. v. Shea, 142 Ala. 119 (jury). Culvert not large enough to carry off rain and track washed out. Western R. of Ala. v. Russell [Ala.] 39 So. 311 (jury). Bridge burned and train broke through. Maydole v. Denver & R. G. R. Co., 15 Colo. App. 449 (jury). Yard switchman caught foot in one of many drains in yard, existing when he entered employment. De Forest v. Jewett, 88 N. Y. 264 (court). Car cleaner in defendant's yard, an uncompleted struc-

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ture above street, stepped through hole between rails which had not yet been planked over though men were working at it. He had worked there three or four weeks. Hole neither guarded nor lighted. *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288 (court). One rail of temporary construction track was lower than the other causing dummy engine to tip over. Plaintiff was going over track for first time. *Hoelter v. McDonald*, 82 App. Div. 423, 81 N. Y. S. 616 (jury). Fireman ran into car which because of absence of derailing switch had run down siding on the main track. *Cooper v. New York, O. & W. R. Co.*, 84 App. Div. 42, 82 N. Y. S. 98 (jury). Plaintiff working in pit under tracks in car barn stumbled over transverse wall. *Mullen v. Metropolitan St. R. Co.*, 89 App. Div. 21, 85 N. Y. S. 134 (court). Construction train being run backward for first time, ran over cow. There were no fences along track. *Mendizabal v. New York Cent. & H. R. Co.*, 89 App. Div. 386, 85 N. Y. S. 896 (jury). Elevated tracks had between them narrow planks and if a man braced himself and stood sideways two trains could pass. Outside the tracks there were broad walks with hand rails. Plaintiff, a track repairer, was on narrow walk and was hurt. *McLaughlin v. Manhattan R. Co.*, 111 App. Div. 254, 97 N. Y. S. 719 (court).

p. 442, n. 211. Unblocked Frogs, etc. *Flutter v. New York, C. & St. L. R. Co.*, 27 Ind. App. 511 (unboxed wires. Jury); *Chicago & E. R. Co. v. Lee*, 29 Ind. App. 480 (unboxed wires. Jury); *Gilbert v. Chicago, R. I. & P. R. Co.*, 123 Fed. 832 (unblocked guard rail [others were blocked]. Jury); *Riley v. Louisville & N. R. Co.*

[C. C. A.] 133 Fed. 904 (excavating under frog of which there were many in yard. Court); *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247 (unblocked frog. Court); *Wabash R. Co. v. Kithcart* [C. C. A.] 149 Fed. 108 (unblocked frog. Court); *Appel v. Buffalo, N. Y. & P. Ry. Co.*, 111 N. Y. 550 (unblocked frog. Court); *McNeil v. New York, L. E. & W. R. Co.*, 71 Hun, 24 (unblocked rail. Court); *Quinn v. Chicago, R. I. & P. R. Co.*, 107 Iowa, 410 (unblocked switch. Court).

p. 442, n. 211. *Methods of Operation.* *Maydole v. Denver & R. G. R. Co.*, 15 Colo. App. 449 (recently omitting to make night inspection of bridge. Jury); *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 308 (wheel of car not blocked. Jury); *Kansas City, M. & B. R. Co. v. Thornhill*, 141 Ala. 216 (removing hand car from in front of approaching train. Jury); *Choctaw, O. & G. R. Co. v. Holloway* [C. C. A.] 114 Fed. 458 (absence of look out and light on backing train. Court); *Southern R. Co. v. Logan* [C. C. A.] 138 Fed. 725 (backing train without light. Court); *Chicago & G. W. R. Co. v. Crotty* [C. C. A.] 141 Fed. 913 (pushing car with timber. Court); *Bence v. New York, N. H. & H. R. Co.*, 181 Mass. 221 (overcrowded yard. Court); *Windover v. Troy City R. Co.*, 4 App. Div. 202 (necessity of employing a sand man. Jury); *Devoe v. New York Cent. & H. R. R. Co.*, 70 App. Div. 495, 75 N. Y. S. 136; *Id.*, 174 N. Y. 1 (rule as to flags for car inspectors. Jury).

p. 442, n. 211. *Switches.* *Iowa Gold M. Co. v. Diefenthaler*, 32 Colo. 391 (tram in mill conveying buckets and hand switch defective: worked by plaintiff.

Court); *Wood v. New York Cent. & H. R. R. Co.*, 77 N. E. 27, 184 N. Y. 290 (plaintiff having duty to inspect fell into excavation made by setting up switch. Court).

p. 442, n. 211. Drawbars and Deadwoods. *Taylor v. Boston & M. R. Co.*, 188 Mass. 390 (car being sent to repair shop but plaintiff not warned that it was defective. Jury).

p. 442, n. 211. Brakes. *Denver & R. G. R. Co. v. Scott* [Colo.] 81 P. 763 (absence of driver brakes. Plaintiff a fireman. Court); *Choctaw, O. & G. R. Co. v. Holloway* [C. C. A.] 114 Fed. 458; *Id.*, 191 U. S. 334 (no brakes on engine; plaintiff, a fireman, had ridden fifty miles on the engine before this trip. Jury); *Windover v. Troy City R. Co.*, 4 App. Div. 202 (defective brake. Court); *Wright v. Delaware & H. C. Co.*, 40 Hun, 343 (defective brake. Court).

p. 443, n. 211. Defects in Engines and Cars. *Boyd v. Indian Head Mills*, 131 Ala. 356 (failure to use a "tipple" to unload car by tipping it up. Court); *Kilkin v. New York Cent. & H. R. R. Co.*, 76 App. Div. 529, 78 N. Y. S. 568; *Id.*, 177 N. Y. 566 (snow and ice on top of car caused brakeman to slip. Court); *Wagner v. New York C. & St. L. R. Co.*, 76 App. Div. 552, 78 N. Y. S. 696; *Id.*, 93 App. Div. 14, 86 N. Y. S. 921 (defective derrick car. Jury); *Suttle v. Choctaw, O. & G. R. Co.* [C. C. A.] 144 Fed. 668 (safety coupler defective, but instead of going to other side plaintiff reached in. Court); *Williams v. Choctaw, O. & G. R. Co.* [C. C. A.] 149 Fed. 104 (engine foot board icy and sloping. Court); *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492 (chain between engine and tender broke. Jury);

Johnson v. Boston & M. R. Co. [Vt.] 62 A. 1021 (steam from leaky engine obscured vision. Court).

p. 443, n. 211. Absence of Light. Donovan v. American Linen Co., 180 Mass. 127 (electric lights went out when engine stopped and plaintiff leaving her work slipped as she went down a dark passageway, which usually had natural light. Court); Dene v. Arnold Print Wks., 181 Mass. 560 (servant failed to light gas and plaintiff slipped on oily floor and thrust hand in gears. Court); Chisholm v. Donovan, 188 Mass. 378 (dim room. Court); The Thyra, 114 Fed. 978 (plaintiff fell through hatch, no lights being provided. Court); Dorney v. O'Neill, 60 App. Div. 19, 172 N. Y. 575 (dark passageway in store where a truck loaded with rubbish was left and which injured plaintiff. If the darkness was assumed the presence of the truck was not. Jury); Earle v. Clyde, S. S. Co., 43 Misc. 535, 89 N. Y. S. 500; Id., 103 App. Div. 21, 92 N. Y. S. 839 (where lamps were furnished but fellow servant did not use them—no liability).

p. 443, n. 211. Condition of Floors. Dene v. Arnold Print Wks., 181 Mass. 560 (oil on passageway and boy slipping thrust hand in gears. Court); Wood v. Tileston & H. Co., 182 Mass. 449 (Wooden cleat nailed on floor to prevent ladder slipping broke. Court); Gillette v. General Elec. Co., 187 Mass. 1 (crossing pit on a brace instead of going around. Court); Thompson v. American Writing Paper Co., 187 Mass. 93 (floor fell when heavy weight moved over it because of rusty nails. Plaintiff a carpenter who had worked five years on floors said he knew nothing about this floor.

Unusual construction. Jury); *McRea v. Hood Rubber Co.*, 187 Mass. 326 (cement dripping from tank to floor. Duty of servants to keep floor clean. Court); *White v. William H. Perry Co.*, 190 Mass. 99 (superintendent built platform of sleepers laid crosswise and not spiked from which plaintiff loaded iron and a sleeper slipped off. Jury); *Marshall v. Norcross*, 191 Mass. 568 (absence of flooring required by statute permitted angle iron to fall in building being constructed. Court); *Walker v. Wehking*, 29 Ind. App. 62 (brick lying on runway struck by wheel barrow. Court); *Indiana, N. G. & O. Co. v. Vauble*, 31 Ind. App. 370 (defective blocking and scaffold. Jury); *Monongahela R. Consol. C. & C. Co. v. Hardsaw* [Ind. App.] 77 N. E. 363 (defective gunwale on barge. Jury); *McKean v. Colorado F. & T. Co.*, 18 Colo. App. 285 (plank laid across opening in floor. Plaintiff could go around. Court); *Hughes v. Schnavel*, 20 Colo. App. 306 (scaffold which plaintiff had helped build and worked on, overloaded and weakened by use. Court); *Crawford v. American S. & W. Co.* [C. C. A.] 123 Fed. 275 (removing plates from roof of building some of which were defective and snow covered roof. Court); *American Bridge Co. v. Seeds* [C. C. A.] 144 Fed. 605 (lack of floor timbers on bridge, being constructed. Court); *Davidson v. Cornell*, 132 N. Y. 228 (platform fell because of improper construction of girders. Jury); *Kline v. Abraham*, 178 N. Y. 377 (plaintiff slipped on marble stairs. Court); *Shields v. Robins*, 3 App. Div. 582 (greasy steps. Court); *Ryan v. Porter Mfg. Co.*, 57 Hun, 253 (floor gave way. Plaintiff had opportunity to see how it was constructed. Court); *McCarthy v. Emerson*, 77 App. Div. (238)

562, 79 N. Y. S. 180 (hod carrier walking up plank hit hod against timber. Court); Conley v. Lackawanna I. & S. Co., 94 App. Div. 149, 88 N. Y. S. 123 (plaintiff working on planks laid on cleats at one end and horse at the other stepped on projecting end and plank tipped up. Court); Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. S. 635 (oil on floor. Jury); Siversen v. Jenks, 102 App. Div. 313, 91 N. Y. S. 382 (scaffolding built between piles. Jury); Baker v. Empire Wire Co., 102 App. Div. 125, 92 N. Y. S. 355 (cleats on gangway. Court); Madden v. Hughes, 104 App. Div. 101, 93 N. Y. S. 324 (plank on scaffold broke under strain of work. Jury); Cunningham v. Pierce, 98 N. Y. S. 60 (plank of scaffold sagged as plaintiff stepped on it and wheelbarrow tipped over. Court); Yess v. Chicago Brass Co., 124 Wis. 406 (oil on floor. Court).

p. 443, n. 211. Trap Doors. Bateman v. New York Cent. & H. R. R. Co., 178 N. Y. 84 (trap door in office raised by co-employee and some evidence that when so used it could not be shut from below. Jury).

p. 444, n. 211. Elevator and Other Openings. Bamford v. G. H. Hammond Co., 191 Mass. 479 (uncovered hatchway in vessel being unloaded. Court); McCafferty v. Lewando's F. D. & C. Co. [Mass.] 80 N. E. 460 (hole in floor where cylinder stood. Court); Willdigg v. Knox, 80 App. Div. 390, 80 N. Y. S. 1018 (unguarded cistern on which plaintiff worked. Court); Sheean v. Standard Gas Light Co., 87 App. Div. 174, 84 N. Y. S. 34 (plaintiff replacing cover of water tank stamped on it and it fell. Court); Karch v. Kipp, 90 N. Y. S. 404 (plaintiff walked over platform of elevator unneces-
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sarily as another employe was about to start it. Court); *Rooney v. Brogan Const. Co.*, 107 App. Div. 258, 95 N. Y. S. 1 (unguarded openings in building being constructed. Jury); *Kiernan v. Eidlitz*, 100 N. Y. S. 731 (unguarded elevator. Court); *Dulfer v. Brooklyn Heights R. Co.*, 101 N. Y. S. 207 (pit in car barn. Court); *Vindicator Consol. G. M. Co. v. Firstbrook*, 86 P. 313 (guard rail at shaft raised before cage came up and plaintiff fell into hole. Jury).

p. 444, n. 211. Unrailed Platforms, etc. *Garant v. Cashman*, 183 Mass. 13 (barrier of iron posts on run changed for wooden posts one of which became broken and was nailed back by servant and plaintiff stumbled against it. Jury); *Wagner v. Boston El. R. Co.*, 188 Mass. 437 (platform knocked down by defendant's trolley car. Jury); *Herren v. Tuscaloosa W. Wks. Co.* 40 So. 55, 131 Ala. 81 (low railing and narrow stairs. Court); *Northwestern S. S. Co. v. Griggs* [C. C. A.] 146 Fed. 472 (platform along sheep pen on ship usually protected by netting, netting had been removed. Court).

p. 444, n. 211. Falling Substances. *Sullivan v. New Bedford G. & E. L. Co.*, 190 Mass. 288 (coal falling from traveling tub. Court); *Marshall v. Norcross*, 191 Mass. 568 (because of absence of flooring required by statute an angle iron fell from one story to another of building being constructed. Court); *Sloss I. & S. Co. v. Knowles*, 129 Ala. 410, 30 So. 584 (rock from roof of mine. Court); *Pioneer M. & M. Co. v. Thomas*, 133 Ala. 279 (rock from roof of mine. Court); *Tennessee C. I & R. R. Co. v. Garrett*, 140 Ala. 563 (after blast rock fell. Jury); *Tutweiler C. C. & I. Co. v. Farrington*, 39 So. 898 (roof of mine not propped and fell. Jury); *Jen-*

nings v. Ingle, 35 Ind. App. 153 (man employed to make place safe hurt by falling slate. Court); Cripple Creek Min. Co. v. Brabant, 87 Pac. 794 (man propping roof hurt by falling rock. Jury); Babb v. Oxford Paper Co. [Me.] 59 A. 290 (coal from bucket of coal conveyor. Court).

p. 444, n. 211. Trench. Overbaugh v. Wieber, 106 App. Div. 283, 94 N. Y. S. 644 (caving of trench. Jury); Eichholz v. Niagara Falls H. P. & Mfg. Co., 68 App. Div. 441; Id., 174 N. Y. 519 (wall of trench cracked and fell. Jury).

p. 445, n. 211. Undermined Bank, etc. Bohn v. Havemeyer, 114 N. Y. 296 (sugar in bin subsided. Court); McGovern v. Central Vermont R. Co., 123 N. Y. 280 (grain in elevator falling. Jury); Simons v. Kirk, 173 N. Y. 7 ("Solway Dump." Jury); Vykes v. Duncan Co., 88 App. Div. 129, 84 N. Y. S. 398 (pile of pulp being shovelled away fell. Court); Lynch v. American Linseed Co., 99 N. Y. S. 260 (grain being shovelled to endless chain drew plaintiff with it. Jury).

p. 445, n. 211. Dynamite and Blasting. Poorman Silver Mines of Colo. v. Devling, 81 P. 252 (plaintiff with duty of examining for missed shots, drilled out hole. Court); Dickson v. Newhouse, 82 P. 537 (floor of mine covered with water obscuring missed shots and experienced miner could find but one knowing there were two. Court); James Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 Fed. 151 (drilling missed shot. Jury); O'Brien v. Buffalo Furnace Co. [N. Y.] 76 N. E. 161 (tamping dynamite with steel rod. Jury); Davis v. Somers-Cambridge Co. [Ohio] 79 N. E. 233 (during thunderstorm plaintiff took refuge near building in (241)

which dynamite was stored and which was struck. Court).

p. 445, n. 211. Other Explosives. *Vallie v. Hall*, 184 Mass. 358 (experienced carpenter emptied varnish which exploded. Court); *American C. & F. Co. v. Brinkman* [C. C. A.] 146 Fed. 712 (presence of water in electric motor caused explosion. Jury); *Dickeschied v. Betz*, 80 App. Div. 8, 80 N. Y. S. 175; *Id.*, 176 N. Y. 611 (explosion of varnish due to violation of rule by plaintiff. Court); *Krueger v. Bartholomay Brewing Co.*, 94 App. Div. 58, 87 N. Y. S. 1054 (steam header defective and exploded. Jury); *Cadigan v. Glens Falls G. & E. L. Co.*, 98 N. Y. S. 954 (gas leaking during repairs exploded. Jury); *Nelson v. City of New York*, 101 App. Div. 18, 91 N. Y. S. 763 (boiler exploded because of chlorine in water. Jury); *Sticht v. Buffalo Cereal Co.*, 101 N. Y. S. 905 (explosion of dust in cereal mill—held defendant not negligent. Court).

p. 445, n. 211. Materials for Work. *Arnold v. Harrington Cutlery Co.*, 189 Mass. 547 (use of unannealed steel for knife blades. Jury); *Mullins v. Manhattan Brass Co.*, 47 Misc. 138, 93 N. Y. S. 635 (using ragged pieces of brass in lathe. Court); *Limberg v. Glenwood Lumber Co.*, 127 Colo. 598 (too short reins and wagon without seat. Court).

p. 446, n. 211. Methods of Work. *Nordquist v. Fuller*, 182 Mass. 411 (wet planks loaded on chain which broke; same number put on as when planks were dry; no defect in chain. Court); *Lodi v. Maloney*, 184 Mass. 240 (lowering boiler by rope twisted around post. Rope was slackened then started catching plaintiff's

hand. Court); *Gavin v. Fall R. Auto. Tel. Co.*, 185 Mass. 78 (plaintiff taking in slack of rope had hand drawn into derrick block. Court); *Slade v. Beatie*, 186 Mass. 267 (unnecessarily going under load of lumber being hoisted, which fell. Court); *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511 (lineman carried off pole by cable slipping off arm taking him with it. Court); *Berthotel v. J. W. Bishop Co.*, 187 Mass. 32 (men lifting timber too heavy for them. Court); *Cunningham v. Atlas Tack Co.*, 187 Mass. 51 (loading machine improperly packed. Jury. Jostling of men. Court); *Vecchioni v. New York Cent. & H. R. R. Co.*, 191 Mass. 9 (as to warning trackmen); *Cripple Creek S. & O. Co. v. Sousa*, 86 P. 1005 (plaintiff seeing chips of steel struck off stood where he might be hit. Court); *Alabama S. & W. Co. v. Wrenn*, 136 Ala. 475 (moving heavy casting. Jury); *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181 (striking off rivet heads and particle of steel flew. Jury); *Fletcher Bros. v. Hyde* [Ind. App.] 75 N. E. 9 (dangerous method of raising truss. Jury); *McElwaine-Richards Co. v. Wall*, 76 N. E. 408 (when taking out joists an insecure truss pulled out: building being erected. Court); *Republic I. & S. Co. v. Ohler*, 161 Ind. 393 (sliver flying from rod being struck. Jury); *Fortin v. Manville Co.*, 128 Fed. 642 (cotton thrown on platform where plaintiff worked. Court); *Roessler & H. Chem. Co. v. Peterson* [C. C. A.] 134 Fed. 789 (slacking lime with too little water. Court); *Kueckel v. O'Connor*, 73 App. Div. 594, 76 N. Y. S. 829 (plaintiff worked at bottom of hoistway through which bundles of paper were raised to top of building and one fell. Court); *Skapura v. National Sugar Ref. Co.*, 83 App.

Div. 21, 81 N. Y. S. 1085 (working under coal bucket which fell. Court); Aleckson v. Erie R. Co., 101 App. Div. 395, 91 N. Y. S. 1029 (absence of signalman when logs were being loaded on barge by means of stationary engine. Signal man had been absent short time. Jury); Tydeman v. Prince Line, 102 App. Div. 279, 92 N. Y. S. 446 (method of loading bales in vessel. Court); Motzing v. Excelsior Brew. Co., 107 App. Div. 275, 94 N. Y. S. 1118 (contrivance for melting pitch. Jury); Corrigan v. Oceanic Steam Nav. Co., 14 Misc. 368, 94 N. Y. S. 19 (hot water discharged from side of vessel. Jury); Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421 (brick pier removed causing scaffold to fall. Jury); Walters v. George A. Fuller Co., 74 App. Div. 388, 77 N. Y. S. 681; *Id.*, 82 App. Div. 254, 81 N. Y. S. 919 (construction and handling of derrick); Riddle v. Forty Second St. M. & St. N. Ave. R. Co., 173 N. Y. 327 (constructing switch and struck by train. Court); Rick v. Saginaw Bay Towing Co. [Mich.] 93 N. W. 632 (staging swung by side of vessel. Jury); Orr v. Southern Bell Tel. & T. Co., 132 N. C. 691 (danger of lowering pole without spikes or "dead men" not obvious).

p. 446, n. 211. Piling of Lumber, etc. Hofnauer v. R. H. White Co., 186 Mass. 47 (chests on shelf in store fell on saleswoman. Court); Sampson v. Holbrook [Mass.] 78 N. E. 127 (timber raised by derrick swung against pile of timber and knocked one onto plaintiff. Court); Regan v. Lombard [Mass.] 78 N. E. 476 (pile of curbstones fell. Court); Avery v. Nordyke-Marmon Co., 34 Ind. App. 541 (pile of pig iron fell. Jury); Shaver v. Home Tel. Co. [Ind.

App.] 75 N. E. 288 (when plaintiff cut wire holding stakes on car loaded with poles, they fell. Court); American Rolling M. Co. v. Hullinger, 161 Ind. 673 (truss leaning against gin pole fell. Court); Hull v. Northern Pac. R. Co. [C. C. A.] 136 Fed. 153 (lumber piled by inexperienced men known to plaintiff fell. Court); Deye v. Lodge & S. M. T. Co. [C. C. A.] 137 Fed. 480 (pile of lathe beds fell. Court); Weizinger v. Erie R. Co., 106 App. Div. 411, 94 N. Y. S. 869 (iron beams fell. Court); Chicago, H. & B. Co. v. Mueller, 203 Ill. 558 (pile of bales in warehouse fell. Jury).

p. 446, n. 211. Dangers in Place of Work. Melton v. Jackson Lumber Co., 133 Ala. 580 (tree being felled. Court); Harvey v. Mountain Pride Gold M. Co., 18 Colo. App. 234 (fire in mine carried by draft. Court); Williams v. Sleepy Hollow M. Co., 86 P. 337 (mine flooded. Jury); Duffy v. New York, N. H. & H. R. Co. [Mass.] 77 N. E. 1031 (locomotive wheels on repair shop track rolled down on plaintiff. Court); Portland Gold M. Co. v. Flaherty [C. C. A.] 111 Fed. 312 (foul air in uptake of mine. Jury); The Anchoria, 113 Fed. 982 (rung of ladder so projected as to catch load being raised. Jury); O'Neill v. Pittsburg, C. C. & St. L. R. Co., 130 Fed. 204 (flagman crossing tracks. Court); American Tin Plate Co. v. Smith [C. C. A.] 143 Fed. 281, 149 Fed. 733 (plaintiff climbed post to girder where traveling crane ran. Court); The Buffalo, 147 Fed. 304 (longshoreman first time at work struck by crane of scow. Jury); Montgomery Coal Co. v. Barringer [Ill.] 75 N. E. 900 (open chute through which coal fell. Court); Maltbie v. Belden, 167 N. Y. 307 (fire caught tree which fell. Court); Farrell v.

Tatham, 36 App. Div. 319 (molten lead splashing from uncovered kettle in shot factory. Had previously seen it splash. Court); Ingram v. Fosburg, 73 App. Div. 129, 76 N. Y. S. 344 (elevators in building being constructed. Court); Ehrenfried v. Lackawanna, I. & S. Co., 89 App. Div. 130, 85 N. Y. S. 57; Id., 180 N. Y. 515 (wheel rolling on plaintiff. Court); Schermerhorn v. Glens Falls P. C. Co., 94 App. Div. 600, 88 N. Y. S. 407 (band on lime kiln burst as kiln expanded. Jury); Dooling v. Deutscher Verein, 97 App. Div. 39, 89 N. Y. S. 580 (arrangement of switches to turn on electric current. Court); Wooton v. Flatbush Gas. Co., 102 App. Div. 294, 92 N. Y. S. 380 (plaintiff working in manhole struck by fall of wooden horse placed at top as a warning. Foreman on guard was absent. Court); Date v. New York Glucose Co., 104 App. Div. 207, 93 N. Y. S. 249 (ladder rested on track along which servants pushed truck. Court); Smith v. Manhattan R. Co., 98 N. Y. S. 1 (clearing snow from third rail with iron shovel. Jury); Gardner v. Schenectady R. Co., 98 N. Y. S. 1034 (skilled workman killed by electricity when trimming lamp of old pattern. Court); Wynkoop v. Ludlow Valve Mfg. Co., 98 N. Y. S. 1076 (plaintiff stumbled and put hand on track of traveling crane which went over it. Court); Carey v. Manhattan R. Co., 101 N. Y. S. 631 (plaintiff at work on third rail system injured by a short circuit caused by his tools. Jury); Haworth v. Mineral Belt Tel. Co., 105 Mo. App. 161 (supposed that wires were insulated. Jury); Cox v. American, A. C. Co., 24 R. I. 503 (employed to clean out drain and injured by poisonous gas. Jury); Anderson v. Columbia Imp. Co. [Wash.] 82 P.

1037 (risk of being struck by tree or branches which plaintiff is felling. Court); *Boyer v. Eastern R. Co.*, 87 Minn. 367 (unloading logs from flat cars. Court, and see *supra*, § 90, n. 158).

p. 446, n. 211. Appliances. *Conner v. Draper Co.*, 182 Mass. 184 (wire going through machine struck plaintiff. Proper appliances there to guard against it but not used. Court); *Pierce v. Arnold Print Wks.*, 182 Mass. 260 (chain broke. Jury); *Martin v. Merchants & M. Transp. Co.*, 185 Mass. 487 (straightened hook. Jury); *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586 (superintendent using unsuitable bar and method to move truck. Jury); *Cooper v. Cashman*, 190 Mass. 75 (experienced teamster kicked by horse. Court); *Floyd v. Colorado F. & I. Co.*, 18 Colo. App. 153 (working without block and fall which were at hand Court); *Standard Pottery Co. v. Mondy*, 35 Ind. App. 427 (improper clamp for belts. Court); *Cincinnati, H. & D. R. Co. v. Phinney* [Ind. App.] 77 N. E. 296 (sliver flew from old and battered punch. Court); *Thorn v. New York City Ice Co.*, 46 Hun, 497 (working with dull ice hook. Court); *Allison v. Long Clove Trap Rock Co.*, 75 App. Div. 267, 78 N. Y. S. 69, 86 N. Y. S. 833 (rope used to brake car. Jury); *Meehan v. Atlas, S. M. & M. T. Co.*, 94 App. Div. 306, 87 N. Y. S. 1031 (rotten timber used as jack. Jury); *Wells v. Celluloid Co.*, 175 N. Y. 401 (short hooks substituted for long hooks on chain. Jury); *Vohs v. Shorthill & Co.* [Iowa] 107 N. W. 417 (cutting rail and sliver flew from rail or sledge. Jury); *McDonald v. Standard Oil Co.* [N. J.] 55 A. 289, cutting with cold chisel and chip flew. Court).

p. 447, n. 211. Starting of Machinery. Gregory v. American Thread Co., 187 Mass. 239 (jury); O'Neil v. Ginn, 188 Mass. 346 (jury); Byrne v. Boston Woven H. & R. Co., 191 Mass. 40 (jury); Williams v. Ballard Lumber Co. [Wash.] 83 Pac. 323 (jury).

p. 447, n. 211. Dangerous or Defective Machinery. McAuliffe v. Gale, 180 Mass. 361 (planer throwing chips. Court); Boyle v. Columbian Fire P. Co., 182 Mass. 93 (material hoist fell. Jury); Murphy v. Marston Coal Co., 183 Mass. 385 (iron crank to raise coal wagon improperly welded. Jury); Chambers v. Wampanoag Mills, 189 Mass. 529 (shuttle flew out of loom because of defective guard. Jury); Finnegan v. Winslow Skate Mfg. Co., 189 Mass. 580 (elevator jolted. Jury); Brazil Block Coal Co. v. Gibson, 161 Ind. 319 (attachment on hoisting bucket. Jury); The Thomas Turnbull, 99 Fed. 781 (steam escaping from exhaust pipe. Court); American Distributing Co. v. Thorne [C. C. A.] 122 Fed. 431 (elevator stuck and plaintiff tried to start it. Jury); Hayward v. Key [C. C. A.] 138 Fed. 34 (pneumatic tool recoiled. Jury); Kain v. Smith, 89 N. Y. 375 (defective jigger. Jury); Loushay v. Erie R. Co., 75 App. Div. 619, 78 N. Y. S. 144; Id., 95 App. Div. 102, 88 N. Y. S. 446; Id., 184 N. Y. 583 (handle of switch kicked up. Court); Yess v. Chicago Brass Co., 124 Wis. 406 (machine while operating could not be stopped. Jury).

p. 448, n. 211. Set Screws. Kennedy v. Merrimack P. Co., 185 Mass. 442 (machinist stepping over shaft. Court); Archibald v. Cygolf Shoe Co., 186 Mass. 213 (foreman preparing room for occupancy. Court); Remington & S. Co. v. Blazosseck [C. C. A.] 146 Fed.

363 (belt being unlaced caught on set screw. Plaintiff unskilled. Jury); Walker v. Newton Falls P. Co., 99 App. Div. 47, 90 N. Y. S. 530; Id., 111 App. Div. 19, 97 N. Y. S. 521 (dark place where set screw was. Jury).

p. 449, n. 211. Cogs and Gearing. Buston v. Harvard Brew. Co., 183 Mass. 438 (obliged to turn gears by hand. Court); Gomes v. New Bedford Cordage Co., 187 Mass. 124 (box off gear and plaintiff went to work there temporarily. Jury); Wolfe v. New Bedford Cordage Co., 189 Mass. 591 (tooth of gear breaking when pried off. Court); The Chico, 140 Fed. 568 (uncovered cogs. Court); Shaw v. Sheldon, 103 N. Y. 667 (uncovered cogs. Court); Buchner v. Creamery P. Mfg. Co., 124 Iowa, 445 (plaintiff when picking up a board was hit by another thrown from his grooving machine and, jumping, his hand went into cogs under table. Jury); Williams v. Ballard Lumber Co. [Wash.] 83 P. 323 (machine started and plaintiff's hand went involuntarily into cogs. Jury).

p. 450, n. 211. Revolving Rollers. Chmiel v. Thorn-dike Co., 182 Mass. 112 (stupid man: picker. Court); Peterson v. Morgan Spring Co., 189 Mass. 576 (machine for winding clock springs "set" by plaintiff. Jury); Lack v. Hargraves Mills, 190 Mass. 56 (door of card opened and plaintiff's hand went in. Jury); Makin v. Pettibone C. P. Co., 97 N. Y. S. 894 (paper machine. Jury); Lynch v. Shanley Co., 98 N. Y. S. 406 (mangle. Court); Desrosiers v. Bourn [R. I.] 57 A. 935 (machine which could not be stopped by clutch when loaded and hand caught in rollers. Court). See Yess v. Chicago Brass Co., 124 Wis. 406. (Jury); Kajesta v. Nashua Mfg. Co. [N. H.] 58 A. 874 (stupid foreigner cleaning
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picker. Jury); *Dickenson v. Vernon*, 77 Conn. 537 (paper machine. Court); *Bier v. Hosford* [Wash.] 77 P. 867 (unguarded mangle. Court); *Jensen v. Regan* [Minn.] 99 N. W. 1126 (removing cloth from mangle without stopping it. Court).

p. 451, n. 211. Revolving Knives. *Byrne v. Leonard*, 191 Mass. 269 (fat chopping machine, knives could not be seen, and as he pressed down fat it suddenly went down taking his hands with it. Working at machine temporarily. Jury); *Vaughn v. Glens Falls P. C. Co.*, 105 App. Div. 136, 93 N. Y. S. 979 (plaintiff thrust arm up cement conveyor and was injured by worm. Court).

p. 452, n. 211. Shafting. *Chisholm v. Donovan*, 188 Mass. 378 (covered shaft a few inches from floor over which plaintiff tripped. Court); *Dillon v. National Coal Tar Co.*, 181 N. Y. 215 (clothes caught in shaft. Court).

p. 452, n. 211. Belts and Pulleys. *Robertson v. Ford*, 164 Ind. 538 (belt shipper defective and plaintiff shifted belt by hand. Court); *Wade v. John Thompson Press Co.*, 144 Fed. 305 (lifting belt across pulleys Court); *Devereaux v. Utica S. C. Mills*, 84 App. Div. 34, 82 N. Y. S. 145 (metallic belt fastener snapped out Jury).

p. 453, n. 211. Circular Saws. *McLean v. Paine*, 181 Mass. 287 (circular saw "wobbled" and wood kicked. Jury); *Arkland v. Tabor-Prang Art Co.*, 184 Mass. 243 (plaintiff laying work on table cut by hand saw. Court); *Robinson & Co. v. Etter*, 30 Ind. App. 253 (uneven top of table. Jury).

p. 453, n. 211. Insufficient Force for Work. *Balti-*

more & O. S. W. R. Co. v. Hunsucker, 33 Ind. App. 27 (trying to lift too heavy load. Court); Grout v. Tacoma, E. R. Co., 33 Wash. 524 (insufficient force. Court); Illinois Cent. R. Co. v. Smieske, 104 Ill. App. 194 (working for years with servant who became intoxicated. Court).

Section 96. Dangers Obvious to Minors.*

p. 441, n. 212. Brower v. Locke, 31 Ind. App. 353; Moss v. Mosley, 41 So. 1012; Gartland v. Toledo, W. & W. R. Co., 67 Ill. 498; Decatur Car W. & Mfg. Co. v. Terry, 41 So. 839; Crown v. Orr, 140 N. Y. 450; Evans v. Lake Shore & M. S. R. Co., 12 Hun, 289. *Infra* § 98, n. 233.

p. 447, n. 213. Cog Wheels. Dene v. Arnold Print Wks., 181 Mass. 560 (boy 14 slipped on oily passageway and thrust hand in gears. Court); Bowden v. Marlborough E. M. & L. Co., 185 Mass. 549 (girl of 15, immature, told to stop machine by taking hold of gears. Jury); Dolan v. Boott Cotton Mills, 185 Mass. 576 (girl having worked on machine with covered gears tried to clean machine with exposed gears, while in motion. Jury); St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495 (girl of 20. Court. Cites many examples of obvious risks); Mundhenke v. Oregon City Mfg. Co. [Or.] 81 Pac. 977 (boy of 17; danger of working near cog wheels is obvious but not that he might slip on floor and fall against them).

p. 448, n. 213. Circular Saws. Sink v. The Sikes Co., 134 Fed. 144 (frame of saw loose. Jury); Rahn v.

* 6 Curr. Law, 568.

Standard Opt. Co., 110 App. Div. 501, 98 N. Y. S. 1060 (boy of 16 did not hold board steady. Jury); Hesse v. National Casket Co., 66 N. J. Law, 652 (boy of 16 hurt on saw by tipping of bench. Court).

p. 449, n. 213. Revolving Rollers. Meunier v. Chemical Paper Co., 180 Mass. 109 (boy of 20 picking paper out of paper machine stuck hand in rollers. Court); Gaudet v. Stansfield, 182 Mass. 451 (girl of 19 hurt on mangle. Court); Joyce v. American Writing Paper Co., 184 Mass. 230 (boy of 15 cleaning duster. Jury); Lynch v. M. T. Stevens & Sons Co., 187 Mass. 397 (boy of 16 hurt on picker which started of itself. Jury); Daniels v. New Eng. Cotton Yarn Co., 188 Mass. 260 (girl of 14 had braid of hair caught in rollers. Court); Rudberg v. Bowden Felting Co., 188 Mass. 365 (boy of 13 trying to start card that was clogged. Jury); Aziz v. Atlantic Cotton Mills, 189 Mass. 156 (boy of 19, ignorant, cleaning clogged picker. Court); Manning v. Excelsior Laundry Co., 189 Mass. 231 (girl of 15 removing cloth from mangle. Jury); O'Neil v. Lowell Machine Shop, 189 Mass. 446 (boy of 14, stupid, polishing caps on lathe. Jury); Burke v. Davis, 191 Mass. 20 (girl of 17, mangle with guard that does not protect. Court); Brower v. Locke, 31 Ind. App. 353 (boy of 14 cleaning card. Jury); Wheeler v. Oak Harbor, H. L. & H. Co. [C. C. A.] 126 Fed. 348, 141 Fed. 61 (skirts of girl of 19 caught in unboxed shaft near window where employes sat. Jury); Sanvageau v. River Spinning Co., 129 Fed. 961 (boy of 18, wool drew hand into card. Jury); National Biscuit Co. v. Nolan [C. C. A.] 138 Fed. 6 (girl thrust hand into endless chain. Court); Sitts v. Waiontha Knitting Co., Ltd., 94 App. Div. 38, 87 N. Y. S. 911

(girl of 15 became faint and hand caught in unguarded mangle. Court); *Evans v. Josephine Mills*, 119 Ga. 448 ("smart, bright," girl of 11 years and some experience, caught in rollers. Jury).

p. 451, n. 213. *Revolving Knives*. *Silva v. Davis*, 191 Mass. 47 (boy of 18 hurt by kicking of board on planer. Jury); *Indiana Mfg. Co. v. Wells*, 31 Ind. App. 460 (boy of 15 hurt by unguarded knives. Jury); *Wright v. Stanley* [C. C. A.] 119 Fed. 330 (boy of 17 slipped and hurt on planer. Jury); *Crown v. Orr*, 140 N. Y. 450 (boy of 19 putting hood on planer. Court).

p. 451, n. 213. *Railroad Dangers*. - *Alabama Min. R. v. Marcus*, 115 Ala. 389 (boy of 19 fell off hand car run too fast. Jury); *King v. Woodstock Iron Co.*, 143 Ala. 632 (boy of 18 brakeman trying to stop cars and hurt by collision. Jury); *Id.*, 42 So. 27 (court); *Evans v. Lake Shore & M. S. R. Co.*, 12 Hun, 289 (brakeman struck switch post. Court).

p. 452, n. 213. *Miscellaneous*. *Dobbins v. Lang*, 181 Mass. 397 (boy of 17 removed box under treadle of power press. Court); *Ettore v. Swingle*, 183 Mass. 194 (boy of 17 hurt while raising stone with jack screw. Court); *Archambault v. Archambault*, 184 Mass. 274 (boy of 18 trimming stone hurt by stone slipping. Court); *Cohen v. Hamblin & Russell Mfg. Co.*, 186 Mass. 544 (boy of 14 hurt on power press. Court); *Moylon v. D. S. McDonald Co.*, 188 Mass. 499 (boy of 14 operating jolting elevator. Jury); *McDonald v. Dutton*, 190 Mass. 391 (boy of 16 caught by hole in plaster on side of elevator wall. Court); *Lennon v. Goodrich* [Mass.] 78 N. E. 421 (boy of 17 cleaning endless bicycle (253)

chain hurt by its winding round shaft. Court); Hodde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 252 (boy of 19 dipping acid with handleless pitcher and some splashed into his eye. Jury); Corning Steel Co. v. Pohlplatz, 29 Ind. App. 250 (boy of 18 standing on pot of molten metal and swinging sledge missed his blow. Court); Foster v. Bemis India Bay Co., 163 Ind. 351 (girl of 19 hurt on printing press. Court); Laporte Carriage Co. v. Sullender, 165 Ind. 290 (boy of 14 working near emery belt. Court); Northern Ala. C. I. & R. Co. v. Becham, 140 Ala. 422 (boy of 17, experienced, injured by premature explosion of dynamite while tamping it. Court); Richards v. Sloss-Sheffield S. & I. Co., 41 So. 288 (boy of 19 slipped on mud as he was boarding mule car. Court); Decatur Car W. Mfg. Co. v. Ferry, 41 So. 839 (boy of 16 hurt by falling of car wheels placed against wall. Jury); Moss v. Mosley, 41 So. 1012 (boy of 14 cleaning machinery in narrow space. Court); Glenmont Lumber Co. v. Roy [C. C. A.] 126 Fed. 524 (boy of 20 in saw mill standing on shaky bumper and using a loose cant hook, hurt by hook slipping whereby he fell on log and was cut by saw. Court); Regling v. Lehmaier, 98 N. Y. S. 642 (boy of 14 hurt on stamping machine. Jury); Mundhenke v. Oregon City Mfg. Co. [Or.] 81 P. 977 (boy of 17 slipped on oily floor and fell against cog wheels. Jury); Bender v. New York Glucose Co. [N. H.] 61 A. 388 (boy of 17 slipped on floor while managng treadle of his machine. Court); Koepeke v. Wisconsin, B. & I. Co. [Wis.] 92 N. W. 558 (boy of 19 stood on narrow timber to throw off belt. Court).

Section 97. Extent of Knowledge.*

p. 451, n. 214. *Glenmont Lumber Co. v. Roy* [C. C. A.] 126 Fed. 524. The servant must not only know the condition but appreciate the danger from it. *Avery v. Nordyke-Marmon Co.*, 34 Ind. App. 541; *Wright v. Chicago, I. & L. R. Co.*, 160 Ind. 583 (mere fact that brakeman knew that switch target was too near track will not permit recovery unless he knew and appreciated danger from it. Jury); *Dickenson v. Vernon*, 77 Conn. 537 (that plaintiff cannot appreciate danger as fully as an experienced man is immaterial, if danger would be obvious and sufficiently appreciated by one of average intelligence.) "All persons of mature years and ordinary experience, and endowed with their natural faculties, must be held to understand the ordinary laws of nature . . . and it must be presumed when such persons have knowledge of obvious defects in appliances or places with or in which they are engaged in performing ordinary labor, and with which they are entirely familiar, they will also comprehend the natural and probable results which will follow from a use of such appliances or from working in such place. If, however, the danger which follows from the use of a defective appliance or from working in an unsafe place is such that it requires long experience or a knowledge of intricate machinery or the possession of expert or scientific knowledge, in order that the danger may be apparent to a person using the defective appliance or working in the dangerous place, a

* 6 Curr. Law, 568.

man without such experience or knowledge will not be presumed to understand or comprehend such danger from knowledge, alone, of the defect in the appliance or place, and in such case a knowledge of the defective condition of the appliances or unsafe character of the place will not defeat a right of recovery unless, the servant, in addition to a knowledge of such defect, comprehends the danger to which he is exposed from the use of the appliances or from working in the place." *Montgomery Coal Co. v. Barringer* [Ill.] 75 N. E. 900. "The importance of such bracing (of platform) . . . may have required some skill or judgment not available to the ordinary observer, or to the plaintiff. The knowledge of what appeared to him to be the situation may not necessarily have advised the plaintiff of the consequences which might result from it." *Davidson v. Cornell*, 132 N. Y. 228. Where girl of 15 had seen foreman, operatives and others remove pieces of linen caught between rollers of mangle without stopping machine the question is for the jury whether she appreciated the risk of so doing. *Manning v. Excelsior Laundry Co.*, 189 Mass. 231.

p. 454, n. 215. The servant must know and appreciate the danger but "generally speaking full appreciation of the danger is unnecessary." *Huggard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475. All the possible consequences of the danger need not be realized in order that servant may assume the risk. *Dickenson v. Vernon*, 77 Conn. 537. Knowing dynamite dangerous and staying near it during thunder shower when it was struck, immaterial that plaintiff did not appreciate the full extent of the danger. *Davis*

v. Somers-Cambridge Co. [Ohio] 79 N. E. 233. Where telephone operator had complained of unusual sensations and later was injured by electric shock, question of her knowledge and appreciation of the risk was for the jury. Cahill v. New Eng. Tel. & T. Co. [Mass.] 79 N. E. 821. Where the plaintiff had worked forty-eight hours without sleep and made complaint and was hurt by a sliver flying from rod which was being hammered, these facts may be considered on the question of his appreciation of the risk. Republic I. & S. Co. v. Ohler, 161 Ind. 393. Plaintiff knew of motor-man's incapacity but could not appreciate that this would take the form of disobedience of specific orders and needlessly causing collision. Jury. Cooney v. Commonwealth Ave. St. Ry. Co. [Mass.] 81 N. E. 905.

p. 455, n. 217. Girl knew that rollers of mangle caught sheets but not that they would catch fingers. Gaudet v. Stansfield, 182 Mass. 451. Machinist knew of shaft but not there was a set screw in it. Kennedy v. Merrimack Papering Co., 185 Mass. 442. Girl knew that rollers wound up thread and did not mean to get her clothes or braid of hair caught in them. Daniels v. New England Cotton Yarn Co., 188 Mass. 260. Boy hurt while cleaning endless bicycle chain by its catching on shaft: had previously cleaned chains which were not joined. Lennon v. Goodrich [Mass.] 78 N. E. 421. Miner knowing that there were two missed shots, because of water on floor of mine could find but one of them. Dickson v. Newhouse, 82 P. 537. Plaintiff removing sheet iron plates from roof knew that some were good and some were bad, also that snow covered roof. Crawford v. American S. & W. Co., 123 (257)

Fed. 275. Boy standing on shaky bumper and using loose cant hook lost balance and fell on saw; said he did not realize danger but court held otherwise. *Glenmont Lumber Co. v. Roy* [C. C. A.] 126 Fed. 524. Brakeman being guilty of negligence in going between cars to couple, the defendant's negligence in failing to block rail is immaterial. *Gilbert v. Burlington, C. R. & N. R. Co.* [C. C. A.] 128 Fed. 529. Plaintiff caught on shaft in which was a key way of which he was ignorant. Court. *Dillon v. National Coal T. Co.*, 181 N. Y. 215. That brakeman may not have known the precise distance from track of the cattle chute that struck him is immaterial. *Wilson v. Lake Shore & M. S. R. Co.* [Mich.] 108 N. W. 1021. Familiar with machine but did not know it could not be stopped when loaded and hand caught in rollers. Court. *Desrosiers v. Bowen* [R. I.] 57 A. 935.

p. 457, n. 220. That boy had cleaned out a cylinder on duster which looked the same on the outside as the one which he was attempting to clean when hurt does not charge him with notice that the inside of both is the same. *Joyce v. American Writing Paper Co.*, 184 Mass. 230. Carpenter who had worked for five years and made repairs on floors injured by floor giving way because cleats pulled out because of rusty nails: this was unusual construction and he knew nothing about it. *Thompson v. American Writing Paper Co.*, 187 Mass. 93. Boy of 14 noticed that elevator shook: question for jury whether he knew or appreciated risk. *Moylon v. D. S. McDonald Co.*, 188 Mass. 499. See, *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580. When cleaning gears which was plaintiff's duty ma-

chine started. She had once seen a similar machine start under like circumstances. *Fountain v. Wampanoag Mills*, 189 Mass. 498. Boy shown how to polish caps on speed lathe but not told that cap might fly out. *O'Neil v. Lowell Machine Shop*, 189 Mass. 446. Plaintiff using unannealed steel for first time in cutting out knife blades noticed sparks and told manager who said he would not see anything like it again; plaintiff later injured by steel flying into his eye. *Arnold v. Harrington Cutlery Co.*, 189 Mass. 547. Boy knew of planer knives but not that board would kick. *Silva v. Davis*, 191 Mass. 47. One knowing that there is snow and ice on walk may not appreciate how slippery it is. *Urquhart v. Smith & Anthony Co.*, 78 N. E. 410, 192 Mass. 257. See, also, *Fitzgerald v. Connecticut R. P. Co.*, 155 Mass. 155. Boy of 19 dipping up heavy mixture of acids with pitcher when some splashed in his eye: had not been told nature of mixture. *Hodde v. Attleboro Mfg. Co.* [Mass.] 79 N. E. 252. Boy of 18 operated hand straw cutter and then worked on power cutter without further instruction. *Flickner v. Lambert* [Ind. App.] 74 N. E. 263. Engineer told of heavy rains and high water is not charged with knowledge of danger of washout caused by inability of culvert to carry water off. *Western R. of Ala. v. Russell*, 39 So. 311. Miner moving roof not propped, question whether he knew its condition at place of injury. *Tutwiler C. C. & I. Co. v. Farrington*, 39 So. 898. Plaintiff knew of foul air in uptake of mine, but was inexperienced having worked three days and danger of it was not appreciated. *Portland Gold Min. Co. v. Flaherty* [C. C. A.] 111 Fed. 312. Boy did not know that wool caught

on cylinder might draw hand in. *Sanvageau v. River Spinning Co.*, 129 Fed. 961. Switchman knowing of scale box did not know how near track it was. *Texas & P. R. Co. v. Swearingen*, 122 Fed. 193; *Id.*, 196 U. S. 51. Inexperienced man unlacing belt hanging from shaft, which caught on set screw of which he was ignorant. *Remington & G. Co. v. Blazosseck* [C. C. A.] 146 Fed. 363; *Mountain Copper Min. Co. v. Pierce* [C. C. A.] 136 Fed. 150. Knew that shale slipped on track but not that it came in such large quantities that train would be derailed. *True v. Lehigh Valley R. Co.*, 22 App. Div. 288. Knowing that scaffold had two planks, might assume it was proper for this work. *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. S. 324. Ignorance of danger in device of ropes to brake car. *Allison v. Long Clove Traprock Co.*, 75 App. Div. 267, 78 N. Y. S. 69, 86 N. Y. S. 833. Knew that third rail carried electricity but ignorant of short circuits and used iron shovel to clear off snow. *Smith v. Manhattan R. Co.*, 98 N. Y. S. 1. Knew that passage from store was dark but not that truck of rubbish was left there which might injure him. *Dorney v. O'Neil*, 60 App. Div. 19, 172 N. Y. 575. Knowing that dynamite was dangerous but ignorant that danger was increased if it was tamped with steel rod. *O'Brien v. Buffalo Furnace Co.* [N. Y.] 76 N. E. 161. Knowing of wires but told that they were insulated. *Haworth v. Mineral Belt Tel. Co.*, 105 Mo. App. 161. Knowing that rails on turn table were old and worn, did not know that when engine was moved on them they would tip up. *Atchison T. & S. F. R. Co. v. Bancord* [Kan.] 71 P. 253. Plaintiff hired to clean out drain and presence of poisonous gases was not obvious to him. *Cox v. American A. C. Co.*, 24 R. I. 503.

Section 98. Presumption as to Knowledge.*

p. 458, n. 224. *Montgomery Coal Co. v. Barringer* [Ill.] 75 N. E. 900, and see *supra*, § 95, n. 206.

p. 459, n. 227. *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492; *Tucker v. Northern Terminal Co.*, 41 Or. 82. The rule of acceptance of risks of the business, even if it might be more safely conducted, being applied in the case of an unskilled laborer, is even more strictly enforced against a skilled laborer. *Foley v. Jersey City E. L. Co.*, 54 N. J. Law, 411.

p. 459, n. 228. Man of 21 employed four months, of little experience, having previously worked on farm was injured while moving heavy casting with block and tackle. Proper to ask other workmen how long a man should work at such a job to become qualified and also whether at time of hiring anything was said about plaintiff's inexperience. *Alabama S. & W. Co. v. Wrenn*, 136 Ala. 475. Master may rely on servant's representation as to his experience and skill. *Saucier v. New Hampshire S. Mills*, 72 N. H. 292.

p. 460, n. 229. Brakeman of 18 years of age "is presumed to have been of sufficient intelligence to assume the risk of the employment to the same extent as if he were twenty-one, and if he was inexperienced and needed special instructions, that was a matter to be shown by evidence on the part of the plaintiff." But taking cars down incline was dangerous work and though he assured foreman he could do it, yet if he were in fact ignorant this would not necessarily relieve the defendant of duty to instruct. *King v. Woodstock Iron Co.*, 143 Ala. 632; *Id.*, 42 So. 27. See, also, *Walton v. Lindsay Lumber Co.*, 39 So. 670.

* 6 Curr. Law, 596.

p. 460, n. 232. Proper to ask whether anything was said about servant's inexperience when he was hired. *Alabama S. & W. Co. v. Wrenn*, 136 Ala. 475. Statement of servant when hired that his only knowledge of using a sledge hammer is what he learned on a farm and that he had never worked in a factory does not establish master's knowledge of his incompetency. Plaintiff was hurt while holding a block which another servant struck to tamp floor. *Wilkinson Coop Glass Co. v. Dickinson*, 35 Ind. App. 230. Girl of 15 had been taught to run loom by her cousin who neglected to tell her about gears. When she was regularly employed the cousin told defendant that she was competent. Defendant did not instruct her and girl was caught in gears while cleaning with broom (court). *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566. Plaintiff had been discharged for incompetence but later hired again, defendant being told that he was incompetent as a lineman and, therefore, he was put at other work. Later he was put on linemen's work and question for jury whether he should have been instructed to make inspection of poles. *Britton v. Central Union Tel. Co.* [C. C. A.] 131 Fed. 844. Mental capacity and intelligence of employe may properly be considered on issue of assumption of risk. *Drake v. San Antonio & A. P. R. Co.* [Tex.] 89 S. W. 407.

p. 460, n. 233. Mere fact of minority (boy of 16) does not necessarily impose greater care on master than if servant were an adult. *Decatur Car Wheel Mfg. Co. v. Terry*, 41 So. 839. Mere fact of minority does not impose greater care, but only where minor is immature in mental and physical faculties and capacity. Ala-

bama Midland R. Co. v. Marcus, 115 Ala. 389; Laporte Carriage Co. v. Sullender, 165 Ind. 290; Evans v. Lake Shore & M. S. R. Co., 12 Hun, 289.

So far as risks occasioned by the condition of the premises or the manner in which the master chooses to conduct his business are concerned there is no essential difference between an infant and an adult for either assumes only those risks which he knows, which are obvious to him, or which he is told about, and so in each case both the character of the risk and the capacity of the employe, whether minor or adult, to observe and appreciate it are in issue. See Evans Laundry Co. v. Crawford, 67 Neb. 153; Carrington v. Muller, 65 N. J. Law, 244; Maco v. Boedker & Co., 127 Iowa, 721; *supra*, § 96, n. 212, and cases cited, §§ 96, 99. There is some doubt whether the rule as to presumption of knowledge of dangers incident to the business, and the risk of fellow-servant's negligence, applies to minors of tender years. In a case where a "smart, bright" girl of eleven who had some previous experience in mills was hurt in moving rollers started by a fellow-servant it was held: "All authorities hold that the fellow-servant rule applies to infants over the age of 14. As to those under that age there is a conflict. Some authorities for cogent reasons hold that the doctrine is not applicable to infants of tender years. All children are chargeable with the result of failing to exercise the due care which their physical and mental capacity fits them for exercising. They are daily brought into the presence of known dangers which they may be reasonably expected to avoid. But the risk from the negligence of fellow-servants, which as a matter of law is presumed to be assumed in

the contract of employment, is the risk of an unknown, contingent, and legal danger, which would make no impression upon the mind of a child of tender years. It is not like a peril obvious to the senses, the very presence of which awakens apprehension, and, when coupled with the fear of pain, is calculated to make the infant avoid it. . . . But under that age (14) while they may be charged with the duty of avoiding dangers of which they know, there is no presumption that they contract to assume the risks which are not patent, of which they do not know, and which relate to the contingent act of a third person." *Evans v. Josephine Mills*, 119 Ga. 448, citing cases. On the other hand it is held that the defense of common employment lies against an infant and the nature of the contract does not depend upon the age of the workman. *Young v. Hoffman Mfg. Co.*, 1907 Weekly Notes, 174. See, also, *supra*, § 96, n. 212. The soundness of the Georgia ruling may well be questioned. No servant actually contracts to take the risk of the negligence of fellow-servants or of other risks of the business, *supra*, § 82, and if it be said that a contract is implied by law, that means simply that public policy has denied to servants certain rights which it grants to strangers, *supra*, § 1, and there is no reason for varying this rule because of the age of the servant unless public policy as declared by the legislature should decree otherwise. The servant's knowledge has no place in the fellow-servant exemption, *supra*, § 89, but the servant's knowledge is of prime importance when the question is whether any duty is owed to him as to the condition of the premises or the method of conducting the business into which

he enters. In the one case the servant cannot recover because he is a "servant;" in the other, the plaintiff's recovery depends upon the same principles which would apply to any one, stranger or servant, invited to the premises and accepting the invitation. *Supra*, § 88. Cases concerning an infant's assumption of risks are to be found § 89, n. 118; § 96, n. 212; § 99, n. 242.

As to the effect of Child Labor statutes, see *supra*, § 51, n. 133, *infra*, § 116. It has been said that the legislature by forbidding children to be employed under a certain age or only upon certain conditions has declared that children illegally employed have not sufficient care, judgment, or capacity to perform the labor they are required to do. This seems to be an unwarranted extension of the scope and purpose of such enactments.

p. 461, n. 234. Evidence that a girl is of less than the average intelligence is immaterial unless it also appears that the defendant knew or ought to have known it. *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260. Jury should be charged to consider age and appearance of boy of 16. *Keating v. Coon*, 102 App. Div. 112, 92 N. Y. S. 474. Fact that trial judge saw how stupid plaintiff was does not prevent appellate court from holding that the risk was appreciated. *Chmiel v. Thorndike Co.*, 182 Mass. 112. Bill of exceptions disclosing nothing to show that appearance of plaintiff would warrant jury in finding him incompetent. *Ettore v. Swingle*, 183 Mass. 194.

p. 461, n. 235. *Aziz v. Atlantic Cotton Mills*, 189 Mass. 156 (boy of 19 unable to speak English and never having worked on machine disobeyed directions and stuck hand in picker. Court); *Chmiel v. Thorn-*

dike Co., 182 Mass. 112 (need not warn a stupid foreigner of danger of putting his hands into picker knives. Court).

Section 99. Duty to Warn.*

p. 463, n. 242. See, also, *supra*, § 98, n. 233.

p. 463, n. 243. Need give no instruction as to obvious dangers. *Crown v. Orr*, 140 N. Y. 450 (boy of 19 hurt on planer); *National Biscuit Co. v. Nolan* [C. C. A.] 138 Fed. 6 (girl caught in endless chain). See *supra*, § 95, n. 206.

p. 464, n. 244. As to effect of Child Labor statutes, see §§ 51, 116.

p. 464, n. 245. *Robinson Min. Co. v. Tolbert*, 132 Ala. 462 (unexploded charge in rock); *Western R. of Ala. v. Russell*, 39 So. 311 (landslide caused by heavy rain and insufficient culvert); *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* [C. C. A.] 115 Fed. 475 (landslide caused by heavy rains); *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181 (sliver flying from rivet head); *Vohs v. Shorthill & Co.* [Iowa] 107 N. W. 417 (splinter flying from rail or sledge); *Yess v. Chicago Brass Co.*, 124 Wis. 406 (machine could not be stopped during its operation); *Holshauser v. Denver, G. & E. Co.*, 18 Colo. App. 431 (failing to warn servant when hired that he might be injured by striking employes). See cases *supra*, §§ 95, 96.

p. 464, n. 246. *Vallie v. Hall*, 184 Mass. 358 (explosion of varnish: plaintiff an experienced carpenter. Court); *Hofnauer v. R. H. White Co.*, 186 Mass. 47

* 6 Curr. Law, 550.

(box resting on shelf fell on saleswoman. Court); Cooper v. Cashman, 190 Mass. 75 (teamster kicked by horse which he had taken care of: plaintiff had 20 years' experience in stables. Court); Jacobson v. Favor [Mass.] 78 N. E. 763 (experienced painter using extension ladder as staging. Court); Melton v. Jackson Lumber Co., 133 Ala. 580 (deaf mute with good eyesight injured by tree being felled striking him: fact of deafness did not impose duty to warn against dangers which could be seen. Court); Northern Ala. C. I. & R. Co. v. Becham, 140 Ala. 422 (boy of 17 experienced in drilling and loading holes with dynamite, hurt while tamping charge. Court); Cleveland, C. C. & St. L. R. Co. v. Haas, 35 Ind. App. 626 (brakeman struck by bridge of standard width. Court). Though the danger be open to observation, yet if the master knows that the servant, through inexperience or otherwise, is unable to understand the risk and avoid the danger he should warn and instruct him. Fletcher Bros. v. Hyde [Ind. App.] 75 N. E. 9.

p. 465, n. 247. Fletcher Bros. v. Hyde [Ind. App.] 75 N. E. 9 (method of raising truss: servant inexperienced. Jury); Smith v. Manhattan R. Co., 98 N. Y. S. 1 (plaintiff told by foreman to clean snow from tracks with iron shovel and not given gloves or warned, hurt by short circuit from third rail. Jury); Alabama, S. & W. Co. v. Wrenn, 136 Ala. 475 (man inexperienced in moving heavy castings with tackle: had previously worked on farm. Jury); Davidson v. Cornell, 132 N. Y. 228 (construction of platform not appreciated by unskilled man).

p. 466, n. 248. Britton v. Central Union Tel. Co. [C. (267)]

C. A.] 131 Fed. 844 (plaintiff previously discharged for incompetence, hired again and defendant told that he was incompetent to work as lineman and therefore given other work but later made a lineman and hurt. Jury).

p. 466, n. 249. *Melton v. Jackson Lumber Co.*, 133 Ala. 580 (deaf mute hurt by falling tree: fact of deafness does not impose duty to warn against dangers which could be seen. Court). Mental capacity and intelligence are properly to be considered. *Drake v. San Antonio & A. P. R. Co.* [Tex.] 89 S. W. 407.

p. 467, n. 250. *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566 (girl of 15 taught to run loom by cousin who told defendant that girl was competent. Cousin had not warned about gears and plaintiff hurt while cleaning them. Defendant had no reason to believe plaintiff needed instruction. Court); *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260 (evidence that girl is less intelligent than average immaterial unless it also appears that defendant knew or ought to have known it. Braid caught on rollers. Court); *Alabama Midland R. Co. v. Marcus*, 115 Ala. 389 (mere fact of minority does not impose any higher degree of care on master, but only where minor is immature in mental and physical faculties and capacity. Hand car run too fast and plaintiff fell. Jury); *Decatur Car Wheel Mfg. Co. v. Terry*, 41 So. 839 (fact of minority does not necessarily impose greater care. Wheels leaning against wall fell. Jury); *Walton v. Lindsay Lumber Co.*, 39 So. 670 (experienced boy of 17 said he knew danger of employment and, therefore, defendant need not warn); *King v. Woodstock Iron Co.*, 143 Ala. 632; *Id.*, 42 So. 27 (268)

(though boy brakeman told foreman he could do work and so foreman not negligent in failing to give special instructions, yet if he were in fact ignorant, the defendant would not be relieved of duty to instruct. Jury); *Laporte Carriage Co. v. Sullender*, 165 Ind. 290 (mere fact of minority does not show that plaintiff needed instruction, it should appear that plaintiff was ignorant and inexperienced and that defendant having actual or constructive knowledge thereof failed to instruct. Pleading); *Wright v. Stanley* [C. C. A.] 119 Fed. 330 (master should instruct minor when he has reason to believe that he does not know about safe method of operating planer. Jury).

p. 468, n. 252. *Western R. of Ala. v. Russell*, 39 So. 311.

p. 468, n. 253. Posting notices in places where they can be read warning operatives against wearing loose garments and long hair is full performance of defendant's duty without calling operatives' attention to them or seeing that they are read thoroughly. *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260.

p. 468, n. 254. Defendant had posted sign on material hoist, "Dangerous. Keep out," but superintendent and others disregarded it and jury might find that plaintiff rode on hoist at defendant's invitation. Evidence that hoist was commonly so used is admissible. *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93. Warning posted that servants must not use tramway as means of access to mine and though superintendent knew it was sometimes violated, a servant using the tramway could not recover. *Union C. & C. Co. v. Sundberg*, 85 P. 319; *Aker v. Barnet & A. K. Co.*, 118

App. Div. 463 (for jury whether defendant knew notice was violated). See *Sweetland v. Lynn, & B. R. Co.*, 177 Mass. 574 (sign in street car against riding on front platform).

p. 468, n. 255. *Klos v. Hudson R. O. & I. Co.*, 77 App. Div. 566, 79 N. Y. S. 156 (premature explosion of dynamite because of fellow-servant's negligence. Need not warn of the possible dangers of such negligence).

p. 470, n. 260. *Byrne v. Learnard*, 191 Mass. 269; *Tivnan v. Keakon*, 101 N. Y. S. 1076 (starting engine); *Lynch v. Shanley Co.*, 98 N. Y. S. 406 (plaintiff knowing danger had hand caught in mangle. She said she had been told to clean roller on the involving side rather than on the safe revolving side. No duty to instruct, also the careless direction of foreman concerned a detail of the work and was not a duty resting on master. Action at common law. Court).

p. 470, n. 261. *Equitable Life Assur. Co. v. Tolbert* [C. C. A.] 145 Fed. 338 (proper instructions to elevator man 51 years old. Court). Machine while operating could not be stopped but inexperienced servant was told that machine could be stopped by stepping on lever. Jury. *Yess v. Chicago Brass Co.* 124 Wis. 406. Boy not told but doing as the others did. *Glover v. Dwight Mfg. Co.*, 148 Mass. 22. Boy of 19 being told if rubber did not pass between rollers to push it with hand did not justify him in not using care that his hand was not drawn in. Court. *Sullivan v. Simplex Elec. Co.*, 178 Mass. 35. Immature girl of 15 told to stop machine by pressing down lever and then taking hold of gear wheel as it would not stop at once. On third day of work she did not press lever down far

enough and taking hold of gear was hurt. Further instructions were necessary. Jury. *Bowden v. Marborough, E. M. & L. Co.*, 185 Mass. 549. Stupid boy of 14 shown for five minutes how to polish caps on rapid speed lathe but was not told cap might fly out if certain parts were not properly adjusted. After working 20 minutes cap flew out and hurt him. Jury. *O'Neil v. Lowell Mach. Shop*, 189 Mass. 446. Boy of 13 put to work feeding card only instruction being to "watch the other boys." After doing so he started work. The roller becoming clogged he tried to start it with stick but foreman told him to use his hand and he was hurt. Jury. *Rudberg v. Bowden Felting Co.*, 188 Mass. 365. "When the master assumes to instruct the servant in the manner of performing a dangerous duty, and such instructions are improper, or where he instructs the servant to do work in a dangerous manner, though the risk of it is apparent, the servant, especially when of tender years, or of the lower grades of intellectual development, may rely upon the master's presumed superior knowledge and experience in the premises, and perform the duty according to such instructions, without being held to be deprived of his right of action against the master under the doctrine of assuming an obvious risk." *Koren v. National, C. & C. Co.*, 82 App. Div. 527, 81 N. Y. S. 614; *Id.*, 179 N. Y. 552. In warning (but not instructing) a foreigner, defendant may, in absence of knowledge to the contrary, assume that he understands English and is not negligent in acting on that assumption. *Lobstein v. Sajatovitch*, 111 Ill. App. 654. "An employer cannot stand by, we think, and see persons in
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his employ doing things in the course of their employment for his benefit which may result in injury to them if they are not properly warned or instructed, and escape liability on the ground that they had not been told to do what they were doing. By allowing the things to be done without objection he must be held to have assented to the construction thus given in effect by his employes to the scope of their duties." Girl hurt in mangle doing as she had seen others do. *Manning v. Excelsior Laundry Co.*, 189 Mass. 231 (jury); *Ludwig v. Spicer* [Minn.] 109 N. W. 832 (feeding mangle improperly).

p. 471, n. 263. See *Sullivan v. Simplex Elec. Co.*, 178 Mass. 35 (boy told to press rubber between rollers with his hand. Court); *Chmiel v. Thorndike Co.*, 182 Mass. 112 (new man, a stupid foreigner, tried to free picker rolls with his hand. He had seen instructor do it while machine was stopped. *De Costa v. Hargraves Mills*, 170 Mass. 375, distinguished on ground that the instructor had put in his hand while machine was in motion. Court); *Joyce v. American Writing Paper Co.*, 184 Mass. 230 (boy of 15 told to work on duster as another workman did, saw workman knock out rags with a stick when they clogged while machine was moving: he tried to do it and was hurt: could not see what was behind opening. Jury); *Dolan v. Boott Cotton Mills*, 185 Mass. 576 (girl who had worked three weeks on machine with covered gears went to work on machine with exposed gears. She had cleaned the first machine but on the second the girl under whom she worked had been accustomed to stop the machine and clean it herself. When plaintiff was told

to clean it she attempted to do it while in motion and was hurt. Jury); *Rudberg v. Bowden Felting Co.*, 188 Mass. 365 (boy under 13 told to watch the other boys and after doing so started to work: attempted to clear clog in card with stick and foreman told him to use his hand. Jury); *Manning v. Excelsior Laundry Co.*, 189 Mass. 231 (girl of 15 had seen other girls, the head folder and the president of defendant company remove linen being ironed from mangle while in motion and had seen superintendent point out pieces that had been caught to other operatives who, thereupon, removed them without stopping machine. Plaintiff trying to do so was caught in roller. Jury); *Byrne v. Learnard*, 191 Mass. 269 (green man set at work on fat chopper: said he did not know of knives and they revolved so rapidly he could not see them, also the mechanism of the machine was concealed. Was told to push fat down with his hands and suddenly fat plunged through knives and plaintiff hurt. Jury); *Kasjeta v. Nashua Mfg. Co.* [N. H.] 58 A. 874 (foreigner of less than average intelligence, never having seen inside of picker or been instructed attempted to clean it and was hurt. Jury).

p. 471, n. 265. *Jennings v. Ingle*, 35 Ind. App. 153.

Section 100. When Place or Machinery is not Furnished by Master.*

p. 473, n. 266. Plaintiff's master sent him to defendant's public dock to get some iron beams. The plaintiff and one of defendant's servants unloaded

* 6 Curr. Law, 539.

them from barge and piled them up. Next day the plaintiff in removing beam was injured by fall of a beam from the pile owing to the improper method of piling. Plaintiff sued owner of dock. Held plaintiff being experienced took the risk and could not recover. If any one, plaintiff's master was responsible. *Weizinger v. Erie R. Co.*, 106 App. Div. 411, 94 N. Y. S. 869.

p. 473, n. 267. Where defendant permitted another company to erect a bridge over defendant's tracks and continued to operate its trains under it, the defendant adopted the bridge as part of its ways and is liable to its servant for absence of whipping straps. *Central of Georgia R. Co. v. Alexander*, 40 So. 424. Defendant may be responsible though the telegraph pole which caused the injury by being placed too near the track was placed there by third parties and defendant did not participate in it. *Illinois Term. R. Co. v. Thompson*, 210 Ill. 226; *South Side E. R. Co. v. Nesvig*, 214 Ill. 463. On question of joint tort feasons, see *Chapman v. Pittsburgh Rys. Co.*, 140 Fed. 784; *Pittsburgh Rys. Co. v. Chapman* [C. C. A.] 145 Fed. 886.

p. 473, n. 268. Plaintiff, an employe of Boston Fire Alarm department, climbed defendant's pole to repair a fire alarm wire and was injured by shock from defendant's wire, it was held that as both wires were on defendant's pole without objection and as plaintiff was acting in course of his duty, jury might find him to be a licensee and if so, defendant was bound to use reasonable care for his safety. *Barker v. Boston El. Co.*, 178 Mass. 503. Plaintiff an employe of People's Tel. Co., which by contract used poles owned by defendant

H. & A. St. R. Co., while lawfully on this pole repairing a telephone wire was hurt by shock from power furnished by defendant, Lowell L. & H. St. R. Co. He was at work on an H. & A. St. R. Co. wire. Held the H. & A. St. R. Co. owed him only the duty not to injure him wilfully and is not liable and the Lowell L. & H. St. R. Co. is not shown to have been negligent. Court. *Sias v. Lowell, L. & H. St. Ry. Co.*, 179 Mass. 343.

p. 474, n. 271. Defendant's servant backed train on to "dead track" where it collided with car. When cars were left on this track the switch lights showed red, when track was clear they showed green. This time they showed green but track was not clear. Depot company owned track and employed its own switchmen but by contract defendant and other railroads used it. Held defendant not liable. Court. *Brady v. Chicago & G. W. R. Co.* [C. C. A.] 114 Fed. 100. See *Southern R. Co. v. Sittasen* [Ind.] 74 N. E. 898; *Id.*, 76 N. E. 973 (lessor railroad liable to servant of lessee for defect in road).

p. 475, n. 272. Street railway ran its cars over a defective bridge owned by defendant city and plaintiff a servant of railway was hurt. He had no means of knowing of defect and could recover. City of Indianapolis v. Cauley, 164 Ind. 304.

p. 475. Plaintiff, a stranger, set a candle near petroleum which exploded. Held that he was guilty of contributory negligence and could not recover. The explosion injured another plaintiff, a servant of defendant, who was allowed to recover on ground that defendant should see that work was properly conducted and that he was not subjected to risks unknown

to him. In *Re Michigan S. S. Co.*, 133 Fed. 577. Defendant's errand boy was sent to deliver tools and went over bridge and stairway not owned by defendant and covered with ice on which plaintiff slipped. Held that ice was a temporary condition against which defendant was not required to warn and that defendant's duty to provide a safe place did not extend to all the routes plaintiff might take. *American Bridge Co. v. Bainum* [C. C. A.] 146 Fed. 367. Plaintiff hiring a workman owed him duty of warning that he might be injured by strikers. *Holshauser v. Denver G. & E. Co.*, 18 Colo. App. 431. Plaintiff employed by defendant in changing tracks of railroad was struck by passing engine of which defendant had given no warning. Held if the place may become dangerous by reason of perils not arising from the particular work, it is the master's duty to give such warning as will enable the servant in the exercise of reasonable care to avoid or guard against such additional dangers. It cannot matter that the added danger arose, not from other work pertaining to the master's business, but from work of third persons, provided that the master knew that such danger was bound to occur. *Johnson v. Terry & Tench Co.*, 99 N. Y. S. 375; *Sheridan v. Interborough Rapid Transit Co.*, 100 N. Y. S. 821; *Riddle v. Forty Second St. M. & St. N. Ave. R. Co.*, 173 N. Y. 327 (plaintiff warned but was careless. Plaintiff employed by defendant a sub-contractor on a building in course of construction who had the use of a hod hoister owned and operated by another contractor. Plaintiff was injured by careless management of hoist by engineer. Held defendant was not responsible for carelessness of

the other contractor's servant, or absence of safe guards. Dissenting opinion held that defendant might be chargeable with negligence in using such a hoist. *Duffy v. Williams*, 71 App. Div. 110, 75 N. Y. S. 600. Robinson sent his servant, the plaintiff, to unload hay from car in defendant's yard and plaintiff was injured by defect in the car. Robinson knew of defect and had notified defendant but latter had failed to remedy it. Defendant contended that Robinson was negligent in sending plaintiff there or in failing to warn him and his carelessness was the proximate cause, but held that as Robinson had notified defendant and latter had failed to remedy defect defendant was liable. *Ladd v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 742.

Section 101. Contractual Assumption of Risk Applies Only to Servants.*

p. 477, n. 273. A passenger on running board of street car was struck by a pole near the track the location of which he knew. "The traveler in the one case, and the servant in the other, have a right to rely upon the presumption that the public authorities, and the master have performed their duty in providing a reasonably safe way. A passenger also may rely upon the presumption that a common carrier has adopted and maintains a reasonably safe mode of transportation. If an injury is suffered by either, his previous knowledge of unsafe conditions is important on the question of his negligence but it is not conclusive." Jury. *Pomeroy v. Boston & N. St. R. Co.* [Mass.] 79

* 6 Curr. Law, 531.

N. E. 764. Plaintiff an express messenger employed by United States Express company was injured while riding in defendant's train by defendant's negligence. There was a contract between express company and defendant whereby plaintiff was to be transported free of charge and was to assume all transportation risks, defendant being indemnified. Plaintiff had no knowledge of this contract. Held that plaintiff was a passenger and while he assumed the ordinary risks of his employment as express messenger there is no presumption or implied understanding that he took upon himself the risks of defendant's negligence: he could not be subjected to such risks without his consent. *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59. Where plaintiff employed by a street railway was injured by defective bridge owned by defendant city over which cars ran it was held that he did not have means of knowing of defect and risk was not assumed. *City of Indianapolis v. Cauley*, 164 Ind. 304. Plaintiff went to defendant's yard to unload lumber and when driving over bridge alongside defendant's tracks his horses became frightened at engine blowing off steam. Held that one driving his horses upon railroad property or near engines must be charged with knowledge of sounds incident to their operation and assumes the risk of his horses being frightened at them but he does not assume the risk of unusual noises. *Allen v. Florence & C. C. R. Co.*, 15 Colo. App. 213. Plaintiff a truckman was sent by his master to defendant's public dock to unload iron beams which he did with help of defendant's servant and piled them on dock. Next day plaintiff went to remove them and while doing so a beam fell on him owing to the improper method of pil-

ing. The method was apparent and plaintiff was experienced. Held plaintiff took the risk of beams slipping when he placed himself alongside the pile. *Weizinger v. Erie R. Co.*, 106 App. Div. 411, 94 N. Y. S. 869. Where plaintiff was sent by his master to repair a defective boiler belonging to the defendant and was injured by its explosion when fired by defendant's servant, probably at the plaintiff's request, and the plaintiff sued the owner and not his master, it was held that he took the risk. *Olive v. Whitney Marble Co.*, 103 N. Y. 292. A convict leased out by state to employer does not voluntarily engage in the service, being compelled to work and, therefore, does not assume the ordinary or obvious risks of the employment. But he cannot recover for injury from any risks to which he voluntarily subjects himself. *Simonds v. Georgia T. & C. Co.*, 133 Fed. 776.

p. 478, n. 275. The plaintiff, servant of a subcontractor, was at work on defendant's elevated structure. He was standing on a platform of loose boards under which ran a sagging trolley wire of defendant's. If defendant's car passed slowly under this platform the trolley pole would not slip off the wire but if it passed rapidly the trolley was likely to snap off and strike the platform: this happened and plaintiff was injured. He knew that the cars slackened speed as they passed under platform. Defendant contended that plaintiff by his conduct assumed the risk of all accidents that might arise under his employment, even if caused by its negligence. "To support this contention it principally relies on the case of *Woodley v. Metropolitan District Railway*, 2 Ex. Div. 384. It was there said by the majority of a divided court that the plaintiff had

assumed the risk of negligence on the part of the defendant's servants. though at the time of his injury he was in the employment of a contractor, and rightfully upon the defendant's premises under his master's contract. But it was held in the later case of *Yarmouth v. France*, 19 Q. B. D. 647; *Thrussell v. Handyside*, 20 Q. B. D. 359, 365, and *Smith v. Baker* (1891) A. C. 325, that knowledge by the servant did not conclusively limit the liability of the master, and it was a question of fact whether he voluntarily took the chance of injury. . . . If a servant assumes known and obvious risks, mere knowledge that they exist is not sufficient, as there must be a voluntary exposure of himself, with a full appreciation of the danger that may be incurred (citing cases). It is true that these (cited) suits were by a servant for his master's negligence which was not impliedly assumed by his contract of employment. But as the doctrine is held to be applicable where, as in the present case, this relation does not exist, to bar a recovery similar conditions of knowledge and consent must be found. *Wood v. Locke*, 147 Mass. 604. . . . The plaintiff's evidence was to the effect that up to the time of his injury he had observed that the speed of the cars slackened when they passed over the curve, and the pole followed the trolley wire. Whether in the exercise of due care he ought reasonably to have anticipated that they might run faster, with the corresponding probability of injury to himself, or whether by his conduct he willingly exposed himself to what finally occurred, were issues of fact for the jury." *Wagner v. Boston Elevated R. Co.*, 188 Mass. 437. See, also, *supra*, § 100, p. 475.

CHAPTER IX.

ASSUMPTION OF RISK (con't).

- § 102. Dangers not Included in the Contractual Assumption.**
- 103. Scope of Employment.
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- 114a. England.
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- 115. Promise to Repair.
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Section 102. Dangers not Included in the Contractual Assumption.

Section 103. Scope of Employment.

p. 486, n. 13. When scope of plaintiff's employment is in doubt a jury must decide. *Annadall v. Union C. & L. Co.*, 165 Ind. 110. Boy employed on polishing
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machine and needing a small stick in his work, not finding one started to make one on a circular saw and was hurt. Jury. *Rahn v. Standard Optical Co.*, 110 App. Div. 501, 98 N. Y. S. 1060. Workman going to water closet is within the scope of his employment. *Hugard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475. "While the mere act of getting water is not a part of the "duties" of the employe, yet it is a physical necessity which must be attended to while the employe is engaged in his duties, and he is entitled to the same protection in the interval when he leaves his work to get water as when he is actually working, and whether the water is provided by the employer or by himself, the employe has a right to pass over the 'ways' provided by the employer in going to and from the place where his thirst is slaked." *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 So. 96. Workman leaving to get a drink of water and killed while returning is in the employment under the Workman's Compensation Act. *Keenan v. Flemington, C. Co.*, 5 F. 164. Sc. Ct. Sess. Cas. 5th Ser. See Mass. Acts 1902, c. 177, requiring drinking water to be furnished. Going to relieve nature within scope of employment. *Elliott v. Rex*, 116 L. T. Jour. 314. Contra, *Pearce v. London & S. W. R. Co.*, *The Times*, Nov. 21, 1899. Plaintiff temporarily suspended from work in mine stayed in pass-way instead of going, as the rule in such case required, to the pit bottom where the cage went up. He was also told to go there but did not and was injured by falling roof; not in course of his employment under Workmens' Compensation Act. *Smith v. South Nor-*

manton C. Co. C. A. [1903] 1 K. B. 204. Part of floor over boiler room had been removed and plaintiff hung his clothes at remaining part which gave way. Hanging clothes there was an incident of his labor and defendant should provide a suitable place. *Muhlens v. Obermeyer & Liebmann*, 83 App. Div. 84, 82 N. Y. S. 527. Pushing car by hand not outside scope of employment of servant hired to move cars. *Dill v. Marmon*, 164 Ind. 507. That plaintiff need not himself couple cars does not show that he was acting out of his employment in doing so. *Louisville & N. R. Co. v. York*, 128 Ala. 305. One who had worked on a planer and then worked on an adjoining wood-working machine is not acting out of his employment. *American, C. & F. Co. v. Clark*, 32 Ind. App. 644. Plaintiff hired as a chainer and evidence was conflicting whether his duties required him to go where the cars were loaded. *Jury*. *Tutwiler C. C. & I Co. v. Enslen*, 129 Ala. 336. Boy is not acting out of scope of his employment where though not originally hired as such he has been acting as errand boy for two weeks. *Hodde v. Attleboro Mfg. Co.* [Mass.] 79 N. E. 252. Defendant claimed that conductor's duties ceased after the train came into the hands of the switch crew and did not begin again until after switch crew had finished their work and in the interim the conductor was without authority to give orders. In practice he often did so and question was for jury. *Edgar v. New York, N. H. & H. R. Co.*, 188 Mass. 420. Where plaintiff once worked on a fat chopping machine while the regular operative went to dinner and later worked again in the absence of the regu-

lar man but on his return kept on working and was hurt, the superintendent having told him to work the first time, and the plaintiff testifying that he was supposed to stop working at one o'clock it was a question for the jury whether the plaintiff did not understand that he was to continue at work and whether superintendent approved it. *Byrne v. Learnard*, 191 Mass. 269. A master by allowing his employes to do things without objection must be held to have assented to the construction thus given in effect by his employes to the scope of their duties. *Manning v. Excelsior Laundry Co.*, 189 Mass. 231 (method of operating mangle). See, also, *supra*, § 13.

p. 487, n. 15. Plaintiff employed as an oiler, in an emergency went to the assistance of another employe and was injured by electric shock: question for jury whether he was justified in so doing. *Mehan v. Lowell Elec. L. Corp.* [Mass.] 78 N. E. 385. Plaintiff was at work on canal when fire started on land and burned toward defendant's pile of spiles. Foreman called him to fight fire and while obeying and carrying water a burning tree fell on him. The court said that in a general way it is a servant's duty to protect his master's property. Whether this was within or without the scope of his employment he could not recover for it involved obvious risks which he elected to encounter. *Maltby v. Belden*, 167 N. Y. 307. *Matthews v. Bedworth*, 106 Law Times, 485 (trying to save fellow workman's life, within scope under Workmen's Compensation Act); *Rees v. Thomas* [1899] 1 Q. B. 1015 (trying to stop master's runaway horse, within scope under Workmen's Compensation Act).

Section 104. Servant Going of His Own Accord Outside of Scope.*

p. 488, n. 18. *Robertson v. Ford*, 164 Ind. 538; *Losh v. Richard Evans & Co., Ltd.* [C. C. A.] 51 W. R. 243 (girl employed to pick rubbish out of coal as it passed by her on a band, tried in absence of engineer to start engine and was caught in wheel. Court); *Patterson v. Neal*, 135 Ala. 477 (boy worked as driver and then without foreman's authority worked as a digger. Court); *Baltimore & O. R. Co. v. Doty* [C. C. A.] 133 Fed. 866 (engine hostler going, as part of his duty to take engine to certain place found another servant on it and accordingly ran ahead of it to flag and directed driver to follow. Neither his duty nor any long continued usage required him to do this. Caught foot in trench and run over. Court); *Johnson v. Bridgeport, D. B. & M. Co.*, 135 Fed. 216 (plaintiff without being ordered and after warning by fellow-servant tried to put on belt. Court); *Aziz v. Atlantic Cotton Mills*, 189 Mass. 156 (boy told to put laps of cotton on one end of picker and to take them off at the other, tried to clean out clogs which stopped machine. This was no part of his duty. Court); *Young v. Eugene Dietzgen Co.*, 72 App. Div. 618, 76 N. Y. S. 123; *Id.*, 176 N. Y. 590 (errand boy wrongfully used freight elevator. Court). Under Workmen's Compensation Act. *Edwards v. International C. Co.*, *The Times*, Nov. 13, 1899 (laborer acting as collier—not in scope); *Lowe v. Pearson* [1899] 1 Q. B. 261 (boy meddled with machinery—not in scope); *Harrison v. Whittaker Bros., Ltd.*, 16 T. L. R. 108 (boy hired to grease wheels thought switch was

* 6 Curr. Law, 578, 583.

wrong and trying to turn it was hurt—in scope); *Cambrook v. George*, 114 L. T. Jour. 550 (man changed his work with foreman's knowledge—in scope).

p. 489, n. 22. *Crown v. Orr*, 140 N. Y. 450 (boy employed as helper was told to put hood on planer which was no part of his business. Court). Under Workmen's Compensation Act. *Brown v. Scott*, *The Times*, June 12, 1899 (boy told by servant that boss wanted him to do something which was not the fact—in scope); *Statham v. Galloways, Ltd.*, 109 Law Times 133 (obeying order given contrary to rules—in scope).

p. 489, n. 23. *Geibel v. Elwell*, 19 App. Div. 285, 46 N. Y. S. 76 (plaintiff at request of defendant's servants went to their assistance without other relation with master and not expecting pay. Court); *Di Pietro v. Empire P. C. Co.*, 70 App. Div. 501, 75 N. Y. S. 275 (shaft broke and plaintiff who worked in another room offered his services which were refused: he nevertheless got on scaffold near belts, though warned of danger, and was hurt. Court); *Mull v. Custice Bros. Co.*, 74 App. Div. 561, 77 N. Y. S. 813 (when machinist failed to adjust plaintiff's machine at her request she tried to do so and was hurt. This was no part of her duty. Court); *Kindorf v. Hoellerer*, 87 App. Div. 628, 84 N. Y. S. 465 (coachman helped repair elevator without defendant's knowledge and later was hurt on it. Court).

Section 105. Servant Sent by Master Outside the Scope.

p. 490, n. 26. *Garden City W. S. Co. v. Boecher*, 94 Ill. App. 96 (one directed to work outside the scope of
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his employment and making no objection assumes the risk. The master is not negligent because of such direction.) See *Anderson v. Morrison*, 22 Minn. 274 (minor employe).

p. 490, n. 27. *Maltby v. Belden*, 167 N. Y. 307 (servant told to fight fire). See, also, *supra*, n. 15, *infra*, n. 36.

p. 492, n. 30. Plaintiff hired to load cars in yard was ordered into shop to shear steel plate and hurt by fall of pile of angle irons, which he could not see from where he had to stand and which he did not know was there. Risk not assumed. "An assumed risk rests upon contract. When the plaintiff undertook with appellant to do general work in the yard, he impliedly agreed, as part of his contract of employment, to assume the risk—that is, take his chance—of all known or apparent perils that are usually incident to the place where and the business in which, he is to engage. But the plaintiff's assumption of risk was no broader than his contract. He could not have looked to his employer for protection against an unsafe place, or unsuitable appliances, beyond the general scope of his employment, had he voluntarily gone outside, and when ordered, as in this case, by his employer to go into the shop and do unfamiliar work in an unfamiliar place, with a different set of fellow-workmen, and receiving no notice to the contrary, he had the right to assume that the new working place was safe and in good condition, and as against a danger that was not open, or of which he had no knowledge, actual or constructive, he assumed no risk." *New Castle Bridge Co. v. Doty* [Ind.] 79 N. E. 485. Common laborer di-

rected to help gang making a piston rod, hurt by sliver flying. Had been at work forty-eight hours without sleep: risk not obvious, nor appreciated. One sent into new employment does not necessarily assume risks of new job. *Republic I. & S. Co. v. Ohler*, 161 Ind. 393. Boy having operated a hand straw cutter was put at work on a steam cutter. Outside of his contract of employment and risk not assumed. *Flickner v. Lambert* [Ind. App.] 74 N. E. 263. Because one is ordered outside his regular employment he is not relieved of duty of exercising due care or accepting obvious risks. *Hostler ordered to move material. Citizens St. R. Co. v. Brown*, 29 Ind. App. 185.

p. 498, n. 34. Plaintiff an unskilled laborer called to help on paper machine and caught in rollers. He was not compelled to obey order but did so. "Although he may have been unwilling to undertake this duty, which was more dangerous than those he had engaged to do, yet if with such knowledge of its dangerous character he attempted its performance, because directed by his employer, and from fear that he might otherwise lose his employment, he was not, for these reasons, relieved of the assumption of the hazards incident to the employment." Court. *Dickenson v. Vernon*, 77 Conn. 537. Plaintiff called from regular work to help load machine. Jury. *Cunningham v. Atlas Tack Co.*, 187 Mass. 51. Errand boy put to work on planer and ignorant that board might kick. Jury. *Silva v. Davis*, 191 Mass. 47. Servant sent outside employment entitled to warning of dangers not obvious. *O'Connor v. Atchison, T. & S. F. R. Co.* [C. C. A.] 137 Fed. 503. Servant called from regular work to

help test electric motor which burst. Jury. American C. & F. Co. v. Brinkman [C. C. A.] 146 Fed. 712. Longshoreman sent to unload scow and hurt by crane. Jury. The Buffalo, 147 Fed. 304. While plaintiff was working on canal a fire started and burned toward defendant's pile of spiles and plaintiff was directed to help fight it. While carrying water he was struck by burning tree that fell. Danger obvious. If fighting fire was a new employment he must have realized that it involved new risks and this risk being obvious he cannot recover. Court. Maltby v. Belden, 167 N. Y. 307. Plaintiff told to leave his regular employment and clean out cistern in the evening for which he received extra pay. An iron ladder led into cistern and attempting to descend by lantern light he fell. Court. Willdigg v. Knox, 80 App. Div. 390, 80 N. Y. S. 1018.

p. 500, n. 36. Part of floor had been removed and plaintiff hurt while attempting to pass over a plank laid across. This device was not furnished by master and though foreman called to him to come across he was not obliged to obey order. Court. McKean v. Colorado F. & I. Co., 18 Colo. App. 285. Foreman ordered boy hired as a helper to put hood on planer. He was not bound to obey order. Court. Crown v. Orr, 140 N. Y. 450. See *supra*, n. 22.

Section 106. Abrogating the Old and Making a New Contract.

p. 501, n. 38. Willdigg v. Knox, 80 App. Div. 390, 80 N. Y. S. 1018 (doing extra work in the evening for extra pay, and free to undertake it or not. Court).

p. 501, n. 39. Kennedy v. Manhattan R. Co., 145 N. (289)

Y. 288 (defendant began to use its car yard which was elevated above street and not entirely planked over before it was completed. Plaintiff, a car cleaner, fell through open space. Court. "The defendant had a right to use that structure before it was completely planked over. It could ask its employes to continue their work of cleaning its cars at that yard before the planking was completed, and if with full knowledge of that fact the employes should consent to do the work at that place they would assume the risk consequent thereon").

borer called to fight fire and injured by falling tree.

p. 502, n. 41. *Maltby v. Belden*, 167 N. Y. 307 (la- If this was a new employment he must have realized that it involved new risks, and this particular risk was obvious. Court).

Section 107. Fear of Discharge.

p. 507, n. 50. Plaintiff, an unskilled laborer, was called from his regular employment to help about a paper machine and was caught in the rollers. Obvious risk. Court. "Although he may have been unwilling to undertake this duty, which was more dangerous than those he had engaged to do, yet if with such knowledge of its dangerous character he attempted its performance, because directed by his employer, and from fear that he might otherwise lose his employment, he was not, for these reasons, relieved of the assumption of the hazards incident to the employment." *Dickenson v. Vernon*, 77 Conn. 537. One attempting a perilous task through fear of losing his employment and under protest does not as a matter

of law assume the risk. *Adolff v. Columbia Pretzel Co.*, 100 Mo. App. 109.

p. 514, n. 58. Plaintiff a girl of 17 knew that guard on mangle did not in fact protect her and when she objected to working on it the superintendent said. "If you don't, you can put on your hat and go home." "The fact that she consented to undertake the work only reluctantly and under a threat of dismissal if she should refuse to do it will not save her from being held to have assumed all the obvious risks of her undertaking." Court. *Burke v. Davis*, 191 Mass. 20.

Section 108. Contributory Negligence.*

p. 515, n. 61. *Neylon v. Phillips*, 179 Mass. 334 (shoveller standing behind wagon as it is backed. Court). "A person who utterly fails to use that prudence which the situation and circumstances require is guilty of contributory negligence as a matter of law." Hod carrier striking hod against projecting timber. Court. *McCarthy v. Emerson*, 77 App. Div. 562, 79 N. Y. S. 180.

p. 516, n. 62. Knowledge always evidence on issue of contributory negligence. Striking off rivet heads. Jury. *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181. Knowledge of icy walk not conclusive. *Urquhart v. Smith & Anthony Co.* [Mass.] 78 N. E. 410. *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580 (elevator ran unevenly and experienced plaintiff knew it. Jury); *Pomeroy v. Boston & N. St. R. Co.* [Mass.] 79 N. E. 764 (passenger on running board knowing of pole near track. Jury).

* 6 Curr. Law, 579.

p. 516, n. 63. *Garant v. Cashman*, 183 Mass. 13 (wooden instead of iron posts which gave way. Jury); *Chiappini v. Fitzgerald*, 191 Mass. 598 (undermining bank. Jury); *Rafferty v. Nawn*, 182 Mass. 503 (undermining bank. Jury); *Dunphy v. Boston Elevated R. Co.* [Mass.] 78 N. E. 479 (working on track and entitled to warning. Jury); *Davis Coal Co. v. Polland*, 158 Ind. 607 (working under unpropped roof. Jury); *Diamond Block Coal Co. v. Cuthbertson* [Ind.] 73 N. E. 818; *Id.*, 76 N. E. 1060 (unpropped roof. Jury); *Grand Trunk W. R. Co. v. Melrose* [Ind.] 78 N. E. 190 (absence of device on side track to prevent cars running down. Jury); *City of Greeley v. Foster*, 32 Colo. 292 (caving of trench, danger known. Court); *Tanner v. Harper*, 32 Colo. 156 (tracks so laid that truck fell down shaft in mine. Jury); *Monarch M. D. Co. v. De Voe*, 85 Pac. 633 (untimbered shaft. Jury); *Hannigan v. Smith*, 26 App. Div. 176, 50 N. Y. S. 845 (danger of falling bricks. Court); *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280 (fall of grain in elevator. Jury); *Simone v. Kirk*, 173 N. Y. 7 (undermining bank. Jury); *Eicholz v. Niagara Falls, H. P. & Mfg. Co.*, 68 App. Div. 441; *Id.*, 174 N. Y. 519 (wall of trench cracked and fell. Jury); *Reilly v. Troy Brick Co.*, 184 N. Y. 399 (clay bank fell. Jury); *The Frey*, 113 Fed. 1003 (standing under lowered bucket. Court).

p. 516, n. 64. *Alaska Gold M. Co. v. Muset* [C. C. A.] 114 Fed. 66 (knowing difficulty of escape plaintiff lighted blast. Jury).

p. 516, n. 65. *Morris v. Boston & M. R. Co.*, 184 Mass. 368 (section hand shovelling snow did not look out for train. Court); *Rich v. Pennsylvania R. Co.*, 98 (292)

N. Y. S. 678 (digging ice from track and trying to avoid one train struck by another. Jury); Caffi v. New York Cent. & H. R. R. Co., 102 N. Y. S. 633 (plaintiff whose duty was to warn others was himself struck. Court); Chicago Term. Transp. R. Co. v. Stone [C. C. A.] 118 Fed. 19 (car repairer with flag out. Jury); Canadian Pac. R. Co. v. Elliott [C. C. A.] 137 Fed. 904 (car repairer failed to put out flag. Court); Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 Fed. 56 (track repairer required to look out for himself. Court).

p. 517, n. 66. Dolphin v. New York, N. H. & H. R. Co., 182 Mass. 509 (brakeman crossing tracks. Court); Jean v. Boston & M. R. Co., 181 Mass. 197 (jumped from engine and walked on track without looking. Court); Gilgan v. New York, N. H. & H. R. Co., 185 Mass. 139 (switchman miscalculating speed of train run down while throwing switch. Court); Flutter v. New York, C. & St. L. R. Co., 27 Ind. App. 511 (running alongside engine tripped on wires. Jury); Cleveland, C. C. & St. L. R. Co. v. Goddard, 33 Ind. App. 321 (brakeman throwing switch. Court); Baltimore & O. S. W. R. Co. v. Clapp, 35 Ind. App. 403 (getting off train and run over. Court); Chicago & E. I. R. Co. v. Lawrence [Ind.] 79 N. E. 363 (switchman struck by engine running backward without lights. Jury); Riddle v. Forty Second St. M. & St. N. Ave. Ry. Co., 173 N. Y. 327 (workman in trench near track leaned into train. Court); Keating v. Manhattan R. Co., 110 App. Div. 108, 97 N. Y. S. 107 (switch cleaner struck by engine. Court); State Trust Co. v. Kansas City, P. & G. R. Co. [C. C. A.] 111 Fed 769 (trackman stepped in front of engine. Court); Erie R. Co. v. Moore [C. C.

A.] 113 Fed. 269 (brakeman running in front of train to throw switch injured by defective runway. Jury).

p. 517, n. 67. *Reardon v. Toledo, St. L. & W. R. Co.* [C. C. A.] 147 Fed. 187; *Northern Pac. R. Co. v. Ege-land*, 163 U. S. 93. (Jury.) Trainmen hurt by objects near track. *Boston & M. R. Co. v. Gokey* [C. C. A.] 149 Fed. 42 (plaintiff climbing ladder. Jury); *Illinois Term. R. Co. v. Thompson*, 210 Ill. 226 (telegraph pole leaning toward track. Jury); *Flansberg v. Heywood Bros. & W. Co.*, 190 Mass. 125 (crowded private freight yard. Court); *Wilson v. Lake Shore & M. S. R.* [Mich.] 108 N. W. 1021 (giving signals. Court); *Williams v. Delaware L. & W. R. Co.*, 116 N. Y. 628 (low bridge. Court); *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302 (low bridge, diverted attention. Jury); *Quinlan v. New York, N. H. & H. R. Co.*, 89 App. Div. 266, 85 N. Y. S. 814 (low bridge. Court).

p. 517, n. 68. *Union C. & C. Co. v. Sundberg*, 85 P. 319 (riding on bumpers of tram car, jolted off. Court); *Kane v. Erie R. Co.*, 118 Fed. 223; 133 Fed. 681; 142 Fed. 682 (fireman cleaning engine number while moving. Jury); *Texas & P. R. Co. v. Putnam* [C. C. A.] 120 Fed. 754 (brakeman riding on pilot. Jury); *Olsen v. Cook Inlet C. F. Co.* [C. C. A.] 121 Fed. 726 (trainman riding between engine and first car on construction train. Jury); *Demko v. Carbon Hill, C. Co.* [C. C. A.] 136 Fed. 162 (sitting on end of car on logging road though told to ride in cab. Court); *Tower Lumber Co. v. Brandvold* [C. C. A.] 141 Fed. 919 (unnecessary position on car of logging road. Court); *Seaboard Air L. R. Co. v. Shanklin* [C. C. A.] 148 Fed. 342 (dangerous position on hand car. Jury); *Williams v. Choc-*

taw O. & G. R. Co. [C. C. A.] 149 Fed. 104 (riding on icy foot board of engine. Court).

p. 517, n. 69. Wallace v. Central Vt. R. Co., 138 N. Y. 302.

p. 518, n. 71. Kansas City M. & B. R. Co. v. Flipppo, 138 Ala. 487 (brakeman going between cars. Jury); Mobile, J. & K. C. R. Co. v. Bramberg, 141 Ala. 258 (taking more dangerous way. Jury); McGhee v. Willis, 134 Ala. 281 (coupling cars when engine started. Jury); New York, C. & St. L. R. Co. v. Hamlin [Ind.] 79 N. E. 1040 (adopting unsafe method. Court); Goodrich v. New York Cent. & H. R. R. Co., 116 N. Y. 398 (defective coupling appliances. Jury); McHugh v. Manhattan R. Co., 179 N. Y. 378 (coupling made and train started. Jury); Northern Pac. R. Co. v. Tynan, 119 Fed. 288 (old fashioned couplers, plaintiff standing on inside rather than outside of curve Jury); Gilbert v. Chicago, R. I. & P. R. Co., 123 Fed. 832 [C. C. A.] 128 Fed. 529 (going between cars instead of using automatic device on opposite side. Court); Denver & R. G. R. Co. v. Arrighi, 129 Fed. 347 [C. C. A.] 141 Fed. 67 (permitting hand to get between drawheads using coupling forbidden by U. S. statutes. Jury); McMillan v. Grand Trunk R. Co. [C. C. A.] 130 Fed. 827 (boy disobeyed instructions. Court); Southern R. Co. v. Prunty [C. C. A.] 133 Fed. 13 (standing on engine foot board kicked drawbar with foot and car lurched. Common method. Jury); Taggart v. Republic I. & S. Co. [C. C. A.] 141 Fed. 910 (caught by unblocked frog. Jury); Suttle v. Choctaw, O. & G. R. Co. [C. C. A.] 144 Fed. 668 (going between cars instead of going around and using safety coupler. Court); Baltimore & O. S.

W. R. Co. v. Davis [C. C. A.] 149 Fed. 191 (discovering coupler defective. Jury); Chicago & A. R. Co. v. Walters, 217 Ill. 87 (finding unexpected situation. Jury).

p. 518, n. 72. That plaintiff knows of another and safer way which he does not take is not conclusive of his negligence. Urquhart v. Smith & Anthony Co. [Mass.] 78 N. E. 410 (icy walk. Jury); Moss v. Mosley, 41 So. 1012. Reasonable care in selecting path by dangerous place is all that can be required. Huggard v. Glucose Sugar Ref. Co. [Iowa] 109 N. W. 475 (pipe fell through opening. Jury). To hold servant responsible for taking a less safe way it must appear that he knew of the danger which made it less safe. Osborne v. Alabama, S. & I. Co., 135 Ala. 571 (improperly covered way. Jury); Geis v. Tennessee, C. I. & R. Co., 143 Ala. 299 (leaving path on way home and fell into excavation. Court); Reiter-Conley Mfg. Co. v. Hamlin, 40 So. 280 (need not have gone where block fell. Jury); McKean v. Colorado F. & I. Co., 18 Colo. App. 285 (going over plank laid across hole in floor. Court); Cripple Creek S. & O. Co. v. Souza, 86 P. 1005 (standing where slivers could hit him. Court); Baxter v. Lusher, 159 Ind. 381 (walking on joist in building not intended for that purpose. Court); Cleveland, C. C. & St. L. R. Co. v. Bergschicker, 162 Ind. 108 (fireman hurt while engine taking coal. Jury); Chamberlain v. Wagmire, 32 Ind. App. 442 (going by unguarded vat. Jury); Chicago & E. I. R. Co. v. Stephenson, 33 Ind. App. 95 (if necessary to go under engine such going is not negligence); Chicago, I. & L. R. Co. v. Cunningham, 33 Ind. App. 145 (walking in track. Court);

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Aetna Powder Co. v. Earlandson, 33 Ind. App. 251 (falling in uncovered pit. Jury); Judge v. Elkins, 183 Mass. 229 (walking over bridge and struck by car. Court); Connors v. Merchants Mfg. Co., 184 Mass. 466 (crossing trap doors protecting elevator well when elevator came up. Court); Kennedy v. Merrimack P. Co., 185 Mass. 442 (choosing to step over shaft and caught by set screw. Court); Slade v. Beattie, 186 Mass. 267 (went under load being raised. Court); Gillette v. General Elec. Co., 187 Mass. 1 (crossing pit on brace. Court); Young v. Eugene Dietzgen Co., 72 App. Div. 618, 76 N. Y. S. 123; Id., 176 N. Y. 590 (boy riding on freight elevator which he attempted to operate. Court); Patterson v. V. J. Hedden & Sons Co., 90 N. Y. S. 1069 (taking unlighted way. Court); American Linseed Co. v. Heins [C. C. A.] 141 Fed. 45 (jumping over unguarded drum. Court); Crookston Lumber Co. v. Boutin [C. C. A.] 149 Fed. 680 (knowing of creeping log carriage plaintiff stood where he might be caught by it. Court); Droney v. Doherty, 186 Mass. 205 (elevator did not work properly and one plaintiff got off to examine it and then got on it again when it fell. The other plaintiff being unable to get off stayed on. First plaintiff. Court. Second plaintiff. Jury).

p. 519, n. 75. Sloss-Sheffield S. & I. Co. v. Smith, 40 So. 91 (trying to prevent collision between mule cars by jumping off and holding on to one of them. Jury); Redus v. Milner Coal Co., 41 So. 634 (dumping car without waiting for orders. Court); McElwaine-Richards Co. v. Wall [Ind.] 76 N. E. 408 (improper method of taking out truss. Court); Corning Steel Co. v. Pohlplatz, 29 Ind. App. 250 (standing on pot of hot

metal and swinging sledge, missed his blow. Court); Archambault v. Archambault, 184 Mass. 274 (leaning over stone blocked up in quarry which slipped. Court); Leach v. Central N. Y. T. & T. Co., 81 App. Div. 637, 80 N. Y. S. 1037 (cutting guy on rotten pole unnecessarily. Court); Sheehan v. Standard G. L. Co., 87 App. Div. 174, 84 N. Y. S. 34 (putting cover on tank. Court); Musser-Sauntry L. L. & Mfg. Co. v. Brown [C. C. A.] 126 Fed. 141 (knocking logs down. Court).

p. 519, n. 76. King v. Southern R. Co., 41 So. 639 (told to start fly wheel, and to do so placed stool in such position that in mounting it he grasped cog wheel and hurt. Court); Dawson v. Chicago, R. I. & P. R. Co. [C. C. A.] 114 Fed. 870 (using coupling grip iron instead of hand hold to mount car. Court); Lyle v. Alabama, G. S. R. Co. [C. C. A.] 145 Fed. 611 (stepping on bumper to make coupling. Some evidence that this was usual. Jury).

p. 519, n. 77. Tuscaloosa, W. W. Co. v. Herren, 131 Ala. 81 (tripping on scaffold resting on stairway. Court); Coosa Mfg. Co. v. Williams, 133 Ala. 606 (putting belt on pulley. Court); Going v. Alabama S. & I. Co., 141 Ala. 537 (shifting belt with stick. Jury); Williamson Iron Co. v. McQueen, 40 So. 306 (examining iron furnace to find what was wrong with it. Jury); Moss. v. Mosley, 41 So. 1012 (boy cleaning machinery in dangerous place. Jury); Buchner Chair Co. v. Feulner, 28 Ind. App. 479, 164 Ind. 368 (boy putting hand in drill. Jury); Dickason Coal Co. v. Peach, 32 Ind. App. 33 (man clearing up mine pulled down roof prop. Court); Republic I. & S. Co. v. Jones, 32 Ind. App. 189 (collided with post. Jury); Ameri-

can, C. & F. Co. v. Clark, 32 Ind. App. 644 (not necessarily negligent to work at defective machine); Espenlaub v. Ellis, 34 Ind. App. 163 (slipping on floor and falling into unguarded saw. Jury); Baltimore & O. S. W. R. Co. v. Cavanaugh, 35 Ind. App. 32 (not necessarily negligence to operate unguarded saw. Jury); Stephens v. American C. & F. Co. [Ind. App.] 78 N. E. 335 (adjusting moulder in motion and wrench slipped. Jury); Slattery v. Walker & Pratt Mfg. Co., 179 Mass. 307 (using new check valve on hoist. Jury); Meunier v. Chemical Paper Co., 180 Mass. 109 (putting hand in rollers in narrow space. Court); Wyman v. Clark, 180 Mass. 173 (leaving work on planer and then beginning again without examining whether it had been re-adjusted. Jury); Flint v. Kelly, 180 Mass. 181 (turning roller by hand. Jury); Kleibaz v. Middleton Paper Co., 180 Mass. 363 (elevator stopped and operator did not investigate. Jury); O'Brien v. New York, N. H. & H. R. Co., 180 Mass. 403 (brake slipped on shaft and plaintiff knew it. Court); Conner v. Draper Co., 182 Mass. 184 (failure to use device to prevent end of wire running through machine hitting plaintiff. Court); Gurney v. Le Baron, 182 Mass. 368 (helped build staging and used defective upright. Jury); Mulligan v. McCaffrey, 182 Mass. 420 (improper placing of ladder. Court); Tiffany v. Hathaway, Soule & Harrington, 182 Mass. 431 (selecting machine without dress guards. Court); Ahern v. Hildreth, 183 Mass. 296 (stepping on glass at end of corridor which was railed off. Court); Lodi v. Maloney, 184 Mass. 240 (when loosening rope hand was drawn into block. Court); Arkland v. Taber-Prang Art Co., 184 Mass. 243 (laying work on

saw table and hit saw. Court); *Chisholm v. New England Tel. & T. Co.*, 185 Mass. 82 (using loose pin in telephone pole. Jury); *Foster v. New York, N. H. & H. R. Co.*, 187 Mass. 21 (stepping in hole in floor of car. Jury); *Gregory v. American Thread Co.*, 187 Mass. 239 (machine started catching plaintiff's hand: it had previously done so but foreman said it had been fixed. Jury); *O'Neil v. Ginn*, 188 Mass. 346 (machine started which it had previously done but plaintiff told it had been fixed. Jury); *Smith v. Thompson-Houston E. Co.*, 188 Mass. 371 (switchman jumped on step of car which broke. Jury); *Moylon v. D. S. McDonald Co.*, 188 Mass. 499 (boy operating elevator noticed that it did not run right and reported. Jury); *Carroll v. Metropolitan Coal Co.*, 189 Mass. 159 (rung of ladder broke. Jury); *Fontaine v. Wampanoag Mills*, 189 Mass. 498 (while cleaning gears machine started. Had once seen a similar machine start. Jury); *Arnold v. Harrington Cutlery Co.*, 189 Mass. 547 (had noticed sparks fly from unannealed steel on which he was at work. Jury); *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580 (operator knew elevator jolted. Jury); *White v. Wm. H. Perry Co.*, 190 Mass. 99 (working on platform made of sleepers. Jury); *Cahill v. Boston & M. R. Co.*, 190 Mass. 421 (taking skid from in front of bales which fell. Court); *Little v. Hyde Park Elec. L. Co.*, 191 Mass. 386 (failing to ascertain strength of spike in pole. Court); *McDonnell v. New York, N. H. & H. R. Co.* [Mass.] 78 N. E. 548 (ladder slipped. Jury); *Hannan v. American S. & W. Co.* [Mass.] 78 N. E. 749 (jumping on treadle to stop machine. Jury); *Hodde v. Attleboro Mfg. Co.* [Mass.] 79 N. E. 252 (us-

ing handleless pitcher to dip up acids. Jury); Cullen v. National S. M. R. Co., 114 N. Y. 45 (press defective and plaintiff warned not to put fingers between dies but did so and injured. Court); Wazenski v. New York Cent. & H. R. R. Co., 180 N. Y. 466 (stepping in hole in platform. Jury); Faith v. New York Cent. & H. R. R. Co. [N. Y.] 77 N. E. 1186 (front of locomotive being removed and plaintiff stood where it fell on him. Jury); Tannhauser v. W. E. Uptegrove & Bro., 100 N. Y. S. 245 (using saw. Jury); Wolf v. Devitt, 83 App. Div. 42, 82 N. Y. S. 189; Id., 179 N. Y. 569 (falling in elevator hole. Jury); Gallenkamp v. Garvin Mach. Co., 91 App. Div. 141, 86 N. Y. S. 378; Id., 179 N. Y. 588 (tools fell from conveyer and in trying to pick them up boy was hurt by it. Jury); Wagner v. New York Cent. & St. L. R. Co., 76 App. Div. 552, 78 N. Y. S. 696; Id., 93 App. Div. 14, 86 N. Y. S. 921 (operation of derrick. Court); Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921 (turning too much steam into drum. Court); Hempstock v. Lackawanna I. & S. Co., 98 App. Div. 332, 90 N. Y. S. 663 (working on defective scaffold. Jury); Voegelé v. Bardusch, 98 App. Div. 127, 90 N. Y. S. 735 (feeding meat cutting machine. Court); Mullins v. Manhattan Brass Co., 47 Misc. 138, 93 N. Y. S. 635 (putting pieces of brass in lathe. Court); Scialo v. Steffens, 105 App. Div. 592, 94 N. Y. S. 305 (belt caught in shaft. Court); Dolan v. Herring-Hall-Marvin Safe Co., 105 App. Div. 366, 94 N. Y. S. 421 (pile of iron plates fell, as plaintiff moved them. Court); Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 N. Y. S. 1 (falling down opening in building being erected. Jury); Fink v. Hartog & Bein-

hauer C. Co., 98 N. Y. S. 393 (walking into elevator hole. Court); Rahn v. Standard Optical Co., 110 App. Div. 501, 98 N. Y. S. 1080 (using circular saw. Jury); Meehan v. Hogan, 100 N. Y. S. 1008 (stepping on newly laid brick wall. Jury); Carey v. Manhattan R. Co., 101 N. Y. S. 631 (while at work, made short circuit on third rail system. Jury); Williams v. Northern Lumber Co., 113 Fed. 382 (log rolled from car loaded by plaintiff. Court); American Distributing Co. v. Thorne [C. C. A.] 122 Fed. 431 (helping start elevator. Jury); Bunker Hill M. & C. Co. v. Kittleson [C. C. A.] 121 Fed. 529 (working on inclined chute with rope for support and when rope was later removed, continuing to work there. Court); Sievers v. Eyre, 122 Fed. 734 (cleaning loaded cannon on yacht. Court); Debro v. James Lee's Sons Co., 130 Fed. 385 (fastening threads on winding machine improperly. Court); Kasadarian v. James Hill Mfg. Co., 130 Fed. 62 (plunger of press fell. Jury); Maxfield v. Graveson [C. C. A.] 131 Fed. 841 (derrick fixed by servants broke. Court); In Re Michigan S. S. Co., 133 Fed. 577 (stranger put candle near petroleum and plaintiff hurt. Jury); Johnson v. Bridgeport D. B. & M. Co., 135 Fed. 216 (putting on belt Court); Southern R. Co. v. Logan [C. C. A.] 138 Fed. 725 (running engine in yard without light. Court); Law v. Central Dist. P. & T. Co. [C. C. A.] 140 Fed. 558 (crossed wires. Court); Michigan H. & H. Co. v. Wheeler [C. C. A.] 141 Fed. 61 (using window over unguarded shaft as seat. Jury); American Tin Plate Co. v. Smith [C. C. A.] 143 Fed. 281 (traveling crane ran over plaintiff as he climbed down from track. Jury); Northwestern S. S. Co. v. Griggs [C. C. A.] 146 Fed.

472 (going along unrailed platform. Court); James Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 Fed. 151 (drilling out missed shot. Jury); Thompson-Starrett Co. v. Fitzgerald [C. C. A.] 149 Fed. 721 (stepping on over hanging end of plank in building being constructed. Jury). Running of trains. Woodward Iron Co. v. Herndon, 130 Ala. 364 (running hand car through smoke, and without warning. Jury); Birmingham S. R. Co. v. Powell, 136 Ala. 232 (failure to see that crossing was clear. Court); Hudson v. Peoples St. R. Co., 175 Mass. 23 (motorman running car back over line expecting to meet another car which would not know of his approach. Court); Jones v. New York, N. H. & H. R. Co., 184 Mass. 89 (running at too high speed on down grade. Court); Nagle v. Boston & N. St. R. Co., 188 Mass. 38 (running at high speed in fog and by turnout. Jury); Shannon v. New York Cent. & H. R. R. Co., 88 App. Div. 349, 84 N. Y. S. 646 (engineer running by two signals. Court); Streets v. Grand Trunk R. Co., 76 App. Div. 480, 78 N. Y. S. 729; Id., 178 N. Y. 553 (running by signal set against him. Court); Texas & P. R. Co. v. Reagan [C. C. A.] 118 Fed. 815 (failing to give proper signal); Northern Pac. R. Co. v. Cumiskey [C. C. A.] 137 Fed. 508 (careless signalling. Court); St. Louis & S. F. R. Co. v. Bishard [C. C. A.] 147 Fed. 496 (duty of fireman to watch for signals); Baker v. Philadelphia & R. R. Co., 149 Fed. 882 (seeing signals set against him and then getting signal to come on: no negligence); Western R. of Ala. v. Russell, 39 So. 311 (running into washout. Jury); Chicago G. W. R. Co v. Ruddy [C. C. A.] 131 Fed. 712 (running into washout. Jury).

p. 520, n. 78. *Bauer v. Empire State Dairy Co.*, 100 N. Y. S. 663 (going to unlighted platform to bring in box. Court).

p. 521, n. 79. *Postal Tel. C. Co. v. Hulsey*, 132 Ala. 444 (tree felled. Jury); *Kansas City M. & B. R. Co. v. Thornhill*, 141 Ala. 216 (section hand removing hand car from in front of train. Jury); *Pierson Lumber Co. v. Hart*, 39 So. 566 (jumping from train. Jury); *Southern C. & C. Co. v. Swinney*, 42 So. 808 (leaving mine. Jury); *Chicago I. & L. R. Co. v. Martin*, 31 Ind. App. 308 (jumping from car running down grade. Jury); *Mehan v. Lowell Elec. L. Corp.* [Mass.] 78 N. E. 385 (oiler going to assistance of employe in an emergency and receiving electric shock. Jury); *Sheridan v. Interborough R. T. Co.*, 101 App. Div. 534, 91 N. Y. S. 1052 (scaffold knocked down by passing truck. Jury); *Redhead v. Dunbar & S. D. Co.*, 101 N. Y. S. 301 (derrick tipping. Jury); *Texas & P. R. Co. v. Parks* [C. C. A.] 114 Fed. 161 (whether plaintiff could have gotten away when engineer started. Jury); *Schooner Robert Lewers & Co. v. Kekanoka* [C. C. A.] 114 Fed. 849 (chain broke and plaintiff tried to get from under. Jury); *Omaha Water Co. v. Shamel* [C. C. A.] 147 Fed. 502 (fire, and plaintiff jumped from window. Jury); *Williams v. Ballard Lumber Co.* [Wash.] 83 P. 323 (cleaning under machine when it started unexpectedly and plaintiff stuck his hand into gears. Jury).

Section 109. Disobedience of Rules.*

p. 521, n. 81. *Devoe v. New York Cent. & H. R. R. Co.*, 70 App. Div. 495, 75 N. Y. S. 136; *Id.*, 174 N. Y. 1. See *Alabama G. S. R. Co. v. Bonner*, 39 So. 619 (plead-

* 6 Curr. Law, 586.

ing contract to comply with rules). New York, C. & St. L. R. Co. v. Ropp [Ohio] 81 N. E. 748 (agreement to comply with rules).

p. 521, n. 83. Alabama G. S. R. Co. v. Bonner, 39 So. 619 (coupling cars without stick); Huggins v. Southern R. Co., 41 So. 856 (going between cars to couple; order from superintendent to couple did not impliedly mean to couple in this way); Frounfelker v. Delaware, L. & W. R. Co., 74 App. Div. 224, 77 N. Y. S. 470 (failing to send back flagman); Dickescheid v. Betz, 80 App. Div. 8, 80 N. Y. S. 175; Id., 176 N. Y. 611 (varnish exploded: used in violation of rules); Baltimore & O. R. Co. v. Burris [C. C. A.] 111 Fed. 882 (rule requiring examination of brakes, and plaintiff hurt by defective brake, does not require critical examination. Jury); Southern R. Co. v. Craig [C. C. A.] 113 Fed. 76 (rule as to running extra train: for jury whether plaintiff obeyed it); Erie R. Co. v. Kane [C. C. A.] 118 Fed. 223 (riding on engine); Pratt v. Lake Shore & M. C. R. Co., 63 Hun, 616 (brakeman made agreement that he would examine cars before using them. Jury). New York, C. & St. L. R. Co. v. Ropp [Ohio] 81 N. E. 748 (car repairer failed to put out flag as rule he had agreed to obey required. Court). See *supra*, § 25, n. 152.

p. 522, n. 84. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883 (defendant must show that plaintiff knew of rules).

p. 522, n. 85. A custom to violate rule is not binding on defendant unless it knew or was bound to know of it. Huggins v. Southern R. Co., 41 So. 856. Rules may be made or superseded by habit and custom. Southern Ind. R. Co. v. Davis, 32 Ind. App. 569; Clark v. Manhattan R. Co., 77 App. Div. 284, 79 N. Y. S. 220
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(insufficient evidence to show constructive notice of habitual violation); *Canadian Pac. R. Co. v. Elliott* [C. C. A.] 137 Fed. 904 (rule had not become obsolete). Passenger riding on front platform in violation of rule of street railway company cannot recover though car was crowded. Fact that other passengers rode there does not show that rule was waived. *Court. Burns v. Boston El. R. Co.*, 183 Mass. 96.

p. 522, n. 86. *Brady v. New York, N. H. & H. R. Co.*, 184 Mass. 225 (car repairer failed to put out flag: for jury whether rule had been abandoned and plaintiff could so assume); *Nagle v. Boston & N. St. Ry. Co.*, 188 Mass. 38 (motorman ran by turnout in violation of rule in force for four days on three of which it had been violated. Jury). See *Streets v. Grand Trunk Ry. Co.*, 76 App. Div. 480, 78 N. Y. S. 729; *Id.*, 178 N. Y. 553 (several companies using train yard).

p. 523, n. 88. *Alabama G. S. R. Co. v. Bonner*, 39 So. 619; *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser* [Ind.] 78 N. E. 1033.

p. 523. It is for the court to construe the rule and determine to what employes it applies and the jury should decide whether the plaintiff knew of the rule and if he did whether he had permission from the proper authority to disregard it. *Denver & R. G. R. Co. v. Maydole*, 33 Colo. 150.

Section 110. Temporary Orders and Duties of Master in Course of Work.*

p. 524, n. 93. Direction to servant to hurry about his work is admissible on the question of his negli-

* 6 Curr. Law, 576.

gence. *Erie R. Co. v. Moore* [C. C. A.] 113 Fed. 269. That superintendent told plaintiff to load rails on car "as quick as possible" is inadmissible on his due care as it shows nothing. *Illinois, C. & E. Co. v. Walch*, 132 Ala. 490. Defendant with an oath told plaintiff to take a different position when bales of jute were being raised, and a bale fell. No evidence that defendant had any reason to suppose that he was increasing the danger or had any better means of knowing than the plaintiff: oath was merely emphasis. Court. *O'Connell v. Clark*, 75 App. Div. 619, 78 N. Y. S. 93. See *Lee v. Woolsey*, 16 Weekly Notes (Phila.) 337, where employer is hurrying on his men it is unreasonable to expect the same degree of care.

p. 525, n. 95. After a blast in mine foreman directed plaintiff to pick away rock while he pulled down loose piers. No inspection made and rock fell. Jury. *Tennessee, C. I & R. Co. v. Garrett*, 140 Ala. 563. Foreman told section hand to remove hand car on which they were riding from track in front of train. Jury. *Kansas City M. & B. R. Co. v. Thornhill*, 141 Ala. 216. Lineman removing wires from old to new poles told to cut guy wire and old pole fell. The risk of pole being decayed was incidental to his business and order gave no assurance of safety. Court. *Tanner v. New York, N. H. & H. R. Co.*, 180 Mass. 572. Superintendent told plaintiff to use improperly placed brow on car. Jury. *Murphy v. New York, N. H. & H. R. Co.*, 187 Mass. 18. Plaintiff sent on temporary staging. Jury. *Feeney v. York Mfg. Co.*, 189 Mass. 336. Foreman left cover off hole and ordered plaintiff to work there without warning him. Jury. *Brown v.*

Baltimore & O. R. Co., 142 Fed. 911. Plaintiff told to climb on to track where traveling crane ran and as he was descending, crane without warning ran on to him. American Tin Plate Co. v. Smith [C. C. A.] 143 Fed. 281. Mason sent to work in trench wall of which was cracked and later fell. Jury. Eicholz v. Niagara Falls H. P. & Mfg. Co., 68 App. Div. 441; Id., 174 N. Y. 519. Laborer sent to make repairs and injured by explosion of gas which sometimes leaked, of which he had some knowledge. Nichols v. Brush & D. Mfg. Co., 53 Hun, 137.

p. 526, n. 97. Where old poles were an incidental risk an order which causes one to fall does not entitle plaintiff to rely on warning as to its condition. Court. Tanner v. New York, N. H. & H. R. Co., 180 Mass. 572. Plaintiff seeing that elevator ropes were still, walked over trap door when elevator came through and injured him. Could not rely on any warning and this was not a passageway. Court. Connors v. Merchants Mfg. Co., 184 Mass. 466. Under rules blasts were to be fired at 12 and employes were to leave ten minutes before. No duty to warn. Court. El Paso Gold M. Co. v. Ewing, 86 P. 119. Where plaintiff knew that logs started as soon as hooks were taken off, not entitled to warning when log will start. Court. Olsen v. North Pac. Lumber Co. [C. C. A.] 119 Fed. 77. If servant knows danger of "staking" a car he does not escape the defense of assumption of risk or of contributory negligence because he undertakes it under the order of a superior. Court. Chicago, G. W. R. Co. v. Crotty [C. C. A.] 141 Fed. 913. Poles piled on car and held by wire which plaintiff was told to cut. Court. Shaver v. Home Tel. Co. [Ind. App.] 75 N. E. 288.

p. 527, n. 98. Thomson v. Baird & Co., 6 F. 142. Sc. Ct. of Sess. Cas. 5th Ser. (no duty to warn track repairers that train is coming); Postal Tel. C. Co. v. Hulsey, 132 Ala. 444 (one tree lodged in another and superintendent told plaintiff to cut the standing tree and he would warn him when to look out, which he failed to do. Risk not assumed. Jury); Southern R. Co. v. Howell, 135 Ala. 639 (telegram given brakeman to move train and that track was clear was an assurance of safety. Jury); Republic I. & S. Co. v. Berkes, 162 Ind. 517 (foreman directed wire to be cut in different place); Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852 (plaintiff's place of work became dangerous because of approach of traveling crane against which he could not guard and of which he should have been warned); Shaver v. Home Tel. Co. [Ind. App.] 75 N. E. 288 (told to cut wire which held poles piled on car. Court); Carroll v. New York, N. H. & H. R. Co., 182 Mass. 237 (plaintiff unloading freight from car was injured by train backing down on it. If it was customary to give freight handlers warning in such case he did not assume risk of failure to warn. Jury); Rafferty v. Nawn, 182 Mass. 503 (undermining bank. dangerous unless warning given and foreman went away without providing for it. Jury); Brady v. New York, N. H. & H. R. Co., 184 Mass. 225 (car inspector repairing car injured by another car backed against it. Though rule required him to put out flag which he did not do, evidence was admissible that yard-master had said that he would not run any cars without warning. Jury); Mahoney v. Bay State Pink Granite Co., 184 Mass. 287 (plaintiff ordered to work on stone which had been so improperly placed in

quarry that it slipped. Jury); *Morris v. Boston & M. R. Co.*, 184 Mass. 368 (section hand shoveling snow from track had been told to look out for himself and rules also required it. Not excused from using his eyes by nature of his work. Court); *McKinnon v. Ritter-Conley Mfg. Co.*, 186 Mass. 155 (plaintiff was picking up rivets which fell from men working above him. He complained of danger to superintendent who said "Go back to work and I will take care of you" and also that work was not dangerous. Superintendent did nothing to protect him. Plaintiff could rely on protection and did not assume risk. Jury); *Greenstein v. Chick*, 187 Mass. 157 (superintendent told plaintiff he would shut off power to enable him to unwind belt from shaft. Shaft stopped but started again while he was at work. Jury); *Edgar v. New York, N. H. & H. R. Co.*, 188 Mass. 420 (after train got into yard conductor ordered plaintiff to make a coupling and said he would look out for him, but engine backed on him. Jury); *Riccio v. New York, N. H. & H. R. Co.*, 189 Mass. 358 (snow shoveller in yard not entitled to warning of approaching engine. Court); *Vecchioni v. New York Cent. & H. R. R. Co.*, 191 Mass. 9 (superintendent having been accustomed to warn trackmen of trains went away. Had he failed to give warning being there, plaintiff could have relied upon it and recovered, but as foreman had gone he could not rely on it or recover. Court. In a second case not under Employers' Liability Act but under Railroad Statute there was no recovery); *Dunphy v. Boston El. R. Co.* [Mass.] 78 N. E. 479 (plaintiff working on dangerous loop of elevated tracks looked for trains but superin-

tendent said "all right, Jack" and plaintiff was justified in thinking that superintendent was looking out for him. Jury); *McDonnell v. New York, N. H. & H. R. Co.* [Mass.] 78 N. E. 548 (superintendent placed ladder and told plaintiff to mount it: plaintiff not relieved of necessity of using care. Court); *Meadowcroft v. New York, N. H. & H. R. Co.* [Mass.] 79 N. E. 266 (car checker in busy yard struck by kicked cars. If customary to give warning plaintiff might rely on it. Jury); *Riola v. New York Cent. & H. R. R. Co.*, 97 App. Div. 252, 89 N. Y. S. 945; 100 App. Div. 509, 91 N. Y. S. 599; *Id.*, 184 N. Y. 96 (plaintiff cleaning switch struck by engine. He had said he wanted to watch for trains but foreman said "Never mind, work: I will tell you when train is coming." Negligence was of a fellow-servant and no liability. Court); *Ward v. Naughton*, 74 App. Div. 68, 77 N. Y. S. 344 (two gangs building a tunnel approached near together from opposite ends when a blast on one side knocked down partition and injured plaintiff on the other side. If warning of blast should have been given, it was negligence of a fellow-servant in a detail of the work. Court); *Ryan v. Third Ave. R. Co.*, 92 App. Div. 306, 86 N. Y. S. 1070 (plaintiff working in hole between rails was not warned by foreman there for the purpose of approach of car. Negligence of fellow-servant. Court); *Fleming v. Tuttle*, 98 App. Div. 222, 90 N. Y. S. 661 (foreman told plaintiff to clean out coal chute with a stick and he would take charge of gate controlling flow of coal which he did not do. Jury); *Motzing v. Excelsior Brew. Co.*, 107 App. Div. 275, 94 N. Y. S. 1118 (ordered to take pipes out of

pitch kettles); *Smith v. Manhattan R. Co.*, 98 N. Y. S. 1 (directed to use iron shovel on third rail system); *Johnson v. Terry & Tench Co.*, 99 N. Y. S. 375 (plaintiff engaged in changing tracks of railroad and no one charged with duty of warning him of approach of train. Should warn. Jury); *Sheridan v. Interborough Rapid Trans. Co.*, 100 N. Y. S. 821 (plaintiff at work on scaffold swung over street and struck by passing truck. Could not work and watch. Duty to warn); *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280 (foreman sent plaintiff into grain bin and grain fell. Could rely on fact that he would not be sent into dangerous place); *Western Elec. Co. v. Hanselman* [C. C. A.] 136 Fed. 564 (plaintiff set at work where he had to stand partly in elevator shaft and struck by car. Operator had been told to give warning but did not. Defendant bound to give warning and could not delegate the duty); *Norfolk & W. R. Co. v. Gesswine* [C. C. A.] 144 Fed. 56 (track man, expected to look out for himself and no custom or rule to the contrary, struck by train. Court). Where servants are foreigners master is not obliged to give warning in their language unless he knows that they do not understand English. *Lobstein v. Sajatovitch*, 111 Ill. App. 654.

p. 527, n. 99. See cases cited above.

p. 527, n. 100. *Republic I. & S. Co. v. Jones*, 32 Ind. App. 189 (colliding with post he knew about); *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302 (brakeman knew that bridge had no tell tale but was obliged to stand watching the rear of long train and could recover. Jury). Where there is affirmative evidence that warning was given of engine's approach, evidence from

other witnesses that they did not hear it is not a conflict of evidence which requires submission to a jury. *Baltimore & O. R. Co. v. Baldwin* [C. C. A.] 144 Fed. 53. See *Rainey v. New York Cent. & H. R. R. Co.*, 68 Hun, 495; *Moore v. New York Cent. & H. R. R. Co.*, 75 Hun, 381; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532.

Section 111. Reliance on Care of Master.*

p. 528, n. 102. The presumption is that a servant will exercise due care for his own safety and that a master has also performed his duties. *Looney v. Metropolitan R. Co.*, 200 U. S. 480. Servant may assume that master has used due care to perform his duties. *Louisville & N. A. & C. R. Co. v. Howell*, 147 Ind. 266; *Dill v. Marmon*, 164 Ind. 507; *Diamond Block C. Co. v. Cuthbertson* [Ind.] 73 N. E. 818; *Id.*, 76 N. E. 1060; *Pantzar v. Tilly Foster T. M. Co.*, 99 N. Y. 368. Servant may assume that his helper will use due care. *Kasadarian v. James Hill Mfg. Co.*, 130 Fed. 62. Servant may assume that the others will use due care. *Chicago & E. I. R. Co. v. Stephenson*, 33 Ind. App. 95. If a place is dangerous because foreman may cause appliances to be moved to plaintiff's injury the plaintiff is not obliged to watch to see that he does not do so. *Gould Steel Co. v. Richards*, 30 Ind. App. 348. "The traveler in the one case, and the servant in the other, have a right to rely upon the presumption that the public authorities and the master have performed their duty in providing a reasonably safe way. A

* 6 Curr. Law, 572.

passenger also may rely upon the presumption that a common carrier has adopted and maintains a reasonably safe mode of transportation. If an injury is suffered by either his previous knowledge of unsafe conditions is important on the question of his negligence, but it is not conclusive." Passenger on running board struck by tree near track. *Pomeroy v. Boston & N. St. R. Co.* [Mass.] 79 N. E. 764. See, also, *supra*, § 63, n. 70.

p. 529, n. 105. *Foley v. Pioneer M. Mfg. Co.*, 40 So. 273 (statute requiring circulation of air in mine); *McGhee v. Willis*, 134 Ala. 281 (may assume engineer will not move engine); *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46 (conductor left car on side track); *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1 (mining boss under statute). See, also, *supra*, § 88, n. 116.

p. 529, n. 106. *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586 (superintendent adopting servant's method of moving loaded truck. Jury).

p. 529, n. 107. *Wolf v. Devitt*, 83 App. Div. 42, 82 N. Y. S. 189; *Id.*, 179 N. Y. 569 (plaintiff directed to go down elevator on that floor; dark, and elevator had been removed. Jury); *Rooney v. Brogan Const. Co.*, 107 App. Div. 258, 95 N. Y. S. 1 (unguarded opening); *Jones v. Pioneer M. Mfg. Co.*, 42 So. 998 (plaintiff sent to repair defective engine may assume that superintendent has released the compressed air from it). When master or his superintendent directs the servant what to do the servant may rely on the fact that he may do the work safely in absence of notice to the contrary, *supra*, § 110.

p. 530, n. 109. *Illinois Car & E. Co. v. Walch*, 132 Ala. 490 (car); *Brazil Block Co. v. Gibson*, 160 Ind. 319 (hoisting bucket); *Columbian E. & S. Co. v. O'Burke* [Ind. App.] 77 N. E. 409 (defective acid crate); *White v. William H. Perry Co.*, 190 Mass. 99 (platform made of sleepers); *Kain v. Smith*, 89 N. Y. 375 (jigger); *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. S. 324 (scaffold); *Berthelson v. Gabler*, 111 App. Div. 142, 97 N. Y. S. 421 (scaffold); *Northern Pac. R. Co. v. Tynan* [C. C. A.] 119 Fed. 288 (inspecting cars); *Cumberland Tel. & T. Co. v. Bills* [C. C. A.] 128 Fed. 272 (inspecting decayed telephone pole); *Barto v. Iowa Tel. Co.* [Iowa] 101 N. W. 876 (lineman having no duty to inspect or knowledge did not assume risk of finding live electric light wires strung on poles).

p. 530, n. 111. *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206 (defective tracks); *Northern Ala. R. Co. v. Shea*, 142 Ala. 119 (defective track); *Louisville & N. A. & C. R. Co. v. Kemper*, 153 Ind. 618 (defective road bed); *Baltimore, O. & S. R. Co. v. Roberts*, 161 Ind. 1 (car on side track); *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189 (branches of trees hanging over tracks); *Union Traction Co v. Buckland*, 34 Ind. App. 420 (failure to sand track); *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64 (water spout); *Bunker Hill M. & C. Co. v. Jones* [C. C. A.] 130 Fed. 813 (timbering in mine); *Mountain Copper Co. v. Van Buren* [C. C. A.] 133 Fed. 1 (timbering in mine); *True v. Lehigh Valley R. Co.*, 22 App. Div. 588 (shale slipped in large quantity on track).

p. 530, n. 112. *Columbian E. & S. Co. v. O'Burke* [Ind. App.] 77 N. E. 409.

Section 112. Equal Opportunity to Discover Danger.*

p. 531, n. 114. "The doctrine of assumed risk, depending as it does upon an implied contract between the parties requires something more to raise it than that the employe could have discovered the defect by an examination which he did not, and, under the circumstances, could not reasonably have made or been expected to make." *Monongahela R. Consol. C. & C. Co. v. Hardsaw* [Ind. App.] 77 N. E. 363; 79 N. E. 1062.

p. 531, n. 115. *Pittsburgh R. v. Woodward*, 9 Ind. App. 169.

p. 532, n. 117. *First Nat. Bk. v. Chandler*, 39 So. 822 (incompetent servant. Court); *Walker v. Wehking*, 26 Ind. App. 62 (brick on runway in building being erected. Court); *Evansville, G. & E. L. Co. v. Raley* [Ind. App.] 76 N. E. 548 (decayed pole, not inspected by defendant. Court); *Hughes v. Schnavel*, 20 Colo. App. 306 (simple scaffold which plaintiff had helped build and move and had worked on. Upright split. Court); *Tanner v. New York, N. H. & H. R. Co.*, 180 Mass. 572 (decayed pole, not inspected by defendant. Court); *Lodi v. Maloney*, 184 Mass. 240 (loosening rope and hand drawn into block. Court); *Vallie v. Hall*, 184 Mass. 358 (carpenter emptied varnish which exploded: no evidence that defendant knew more about it than did plaintiff. Court); *Cooper v. Cashman*, 190 Mass. 75 (teamster kicked by horse he had cared for. Court); *Regan v. Lombard*, 181 Mass. 329, 78 N. E. 476 (experienced plaintiff hurt by fall of curbstones either piled improperly or with rotten dun-

* 6 Curr. Law, 570.

nage. Court); Welle v. Celluloid Co., 175 N. Y. 401 (form of iron hook used to raise cylinders of acid was changed from that previously used. Plaintiff had used both kinds. Jury); Thorn v. New York City Ice Co., 46 Hun, 497 (dull ice hook. Court); Flet v. Hunter Arms Co., 74 App. Div. 572, 77 N. Y. S. 752 (foreman and plaintiff using broom handle to carry heavy plate. Court); Davitt v. Metropolitan St. R. Co., 106 App. Div. 567, 94 N. Y. S. 790 (using old ladder in place of stairway. Court); Roessler & H. Chem. Co. v. Peterson [C. C. A.] 134 Fed. 789 (slacking lime with too little water. Court).

p. 532, n. 118. Brazil Block C. Co. v. Gibson, 160 Ind. 319 (attachment on dirt hoisting bucket. Jury); Brower v. Locke, 31 Ind. App. 353 (cylinder on card. Jury); Standard Oil Co. v. Fordeck, 34 Ind. App. 181 (striking off rivet heads. Jury); Columbian E. & S. Co. v. O'Burke [Ind. App.] 77 N. E. 409 (defective acid crate. Jury); Murphy v. Marston Coal Co., 183 Mass. 385 (iron crank on gear raising coal wagon. Jury); Hunt v. Dexter, S. P. & P. Co., 100 App. Div. 119, 91 N. Y. S. 279; Id., 183 N. Y. 544 (explosion of steel digester. Jury); Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334 (no brakes on engine. Jury); Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492 (no chains between engine and tender. Jury).

p. 532, n. 119. Chicago & E. I. R. Co. v. Richards, 28 Ind. App. 46 (car on side track. Jury); Pittsburgh, C. C. & St. L. R. Co. v. Parish, 28 Ind. App. 189 (low tree branches over track. Jury); Harvey v. Mountain Pride G. M. Co., 18 Colo. App. 234 (draft of air in shaft of mine. Court); Dickson v. Newhouse, 82 P. 537

(experienced miner told that there were two missed shots: floor covered with water. Court); *Trapasso v. Coleman*, 74 App. Div. 33, 76 N. Y. S. 798 (rock fell in quarry, probably from previous blast. Court); *Rockport Granite Co. v. Bjornholm* [C. C. A.] 115 Fed. 947 (flying rock from blast in shelly ledge, superintendent made no examination but did give warning. Jury); *Rick v. Saginaw Bay Towing Co.* [Mich.] 93 N. W. 632 (staging swung alongside vessel. Jury). Where rules require servant to make an examination, the defendant is not relieved of the duty of examination and is responsible for defects which could be discovered by means at command of inspector. *Martin v. Wabash R. Co.* [C. C. A.] 142 Fed. 650. See, also, *Newton v. New York Cent. & H. R. R Co.*, 96 App. Div. 81, 89 N. Y. S. 23; *Id.*, 183 N. Y. 556. Plaintiff's duty to test for loose rocks. Court. *Pioneer M. & Mfg. Co. v. Thomas*, 133 Ala. 279. Duty of miner to examine for himself for missed shots. Court. *Poorman Silver M. of Colo. v. Devling*, 81 P. 252. And, see, also, § 93, n. 195.

p. 534, n. 120. *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398.

p. 534, n. 121. *Gregory v. American Thread Co.*, 187 Mass. 239 (plaintiff had seen her machine start after she stopped it day before and on day of accident it worked improperly but foreman said it was all right and had been fixed. Jury); *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397 (plaintiff had seen his machine start and complained and next morning asked his foreman who said it was all right. Jury); *O'Neil v. Ginn*, 188 Mass. 346 (plaintiff had seen her machine start but

was told it had been fixed. Jury); *Arnold v. Harrington Cutlery Co.*, 189 Mass. 547 (noticing sparks flying from steel from which he was cutting knife blades but told he would see nothing like it again. Jury); *Fountain v. Wampanoag Mills*, 189 Mass. 498 (had once seen similar machine start. Jury). See *supra*, § 108.

p. 535, n. 123. Plaintiff starting to place plank across bad ground to prevent its falling upon men below was injured by embankment falling. Court. "It would be an anomalous condition of affairs which would impose upon the master, as a consequence of his efforts to safeguard his employes, liability for an injury resulting to one of them from the very danger which he was seeking to avoid and which was perfectly apparent to the person attempting to remedy the same. Such a rule would require that the master must either personally take such steps as are necessary to protect his employes from dangers which confront them or else run the hazard of being mulcted in damages for any accident which may result therefrom." *Batty v. Niagara Falls H. P. & Mfg. Co.*, 79 App. Div. 466, 79 N. Y. S. 734.

p. 535, n. 124. *City of Greeley v. Foster*, 32 Colo. 292 (bracing trench when it caved. Court); *Cripple Creek M. Co. v. Brabant*, 87 P. 794 (question for jury whether plaintiff engaged in propping roof was making place safe or not); *Indiana & C. C. Co. v. Batey*, 34 Ind. App. 16 (remedying dangerous place in mine: mining statute does not apply since boss can only make mine safe by employing servants to do it. Court); *Jennings v. Ingle*, 35 Ind. App. 153 (making mine safe. Court); *McElwaine-Richards Co. v. Wall* [Ind.] 76

N. E. 408 (constructing building and removing joist. Court); Archibald v. Cygolf Shoe Co., 186 Mass. 213 (foreman sent to get room ready for occupancy and hurt by set screw. Court); O'Keeffe v. John P. Squire Co., 188 Mass. 210 (foreman sent to clean up unused room and hurt by defective floor. Court); Van Derhoff v. New York Cent. & H. R. R. Co., 88 App. Div. 418, 84 N. Y. S. 650 (removing landslide from track. Court); Citrone v. O'Rourke E. Const. Co. [N. Y.] 80 N. E. 1092 (removing broken stone after blast. Court); McGrath v. Texas & P. R. Co., 60 Fed. 555 (one of wrecking crew injured at new and temporary bridge. Court); Moore-Anchor Consol. Gold M., Ltd. v. Hopkins [C. C. A.] 111 Fed. 298 (removing debris from fallen roof and rock fell. Court); Florence & C. C. R. Co. v. Whipps [C. C. A.] 138 Fed. 13 (landslide being cleared. Court); American Bridge Co. v. Seeds [C. C. A.] 144 Fed. 605 (building bridge. Court); Wahlquist v. Maple Grove C. Co., 116 Iowa, 720 (safe-place rule does not apply to one engaged in making it safe). See *supra*, § 91.

p. 536, n. 126. Jones v. Pioneer M. Mfg. Co., 42 So. 998 (plaintiff sent to repair engine might expect that superintendent had released compressed air from it. Jury); Martin v. Des Moines Edison L. Co. [Iowa] 106 N. W. 359 (repairing switch board and injured by electric shock. Jury).

Section 113. Assurances of Safety.*

p. 537, n. 128. See, also, *supra*, § 110.

p. 537, n. 129. Carleton M. M. Co. v. Ryan, 29 Colo.

* 6 Curr. Law, 576.

401 (foreman said he would nail brace, but did not and it fell. Jury); *Cleveland, C. C. & St. L. R. Co. v. Patterson* [Ind. App.] 75 N. E. 857 (cab window boarded up so engineer had to lean to middle of cab to get signal: defendant said this was all right and he would be responsible. Jury); *Lord v. Inhabitants of Wakefield*, 185 Mass. 214 (lineman felt pole tremble and asked if it would better be guyed: foreman said it was all right and to cut wires; pole fell. Jury); *McKinnon v. Riter Conley Mfg. Co.*, 186 Mass. 155 (foreman said there was no danger from falling rivets. Jury); *Smith v. King*, 74 App. Div. 1, 77 N. Y. S. 3 (no girth on tip cart harness, but foreman told plaintiff to go on with work when cart tipped up. Jury); *Di Stefano v. Peekskill L. R. Co.*, 107 App. Div. 293, 95 N. Y. S. 179 (explosion of dynamite in stone being cut. Hearing a report when he first struck the stone he asked foreman who examined and said it was safe. Jury); *Swenson v. Bender* [C. C. A.] 114 Fed. 1 (defective timbering in mine tunnel that foreman said was safe. Jury); *La Salle Co. C. C. Co. v. Offergeld*, 104 Ill. App. 494 (plaintiff complained that workman was incompetent but was told that man was all right and for him to keep at work. Jury).

p. 538, n. 130. *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546 (roof of mine examined by experienced man and pronounced safe but slate fell. Court); *Gregory v. American Thread Co.*, 187 Mass. 239 (plaintiff complained that machine started; foreman said it was all right and that he had fixed it. Jury); *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397 (plaintiff complained to foreman that machine started: next

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morning on inquiry foreman said he had repaired it. Jury); *O'Neil v. Ginn*, 188 Mass. 346 (foreman examined machine which had previously started and said it was all right, and machinist said he had repaired it. Jury); *Arnold v. Harrington Cutlery Co.*, 189 Mass. 547 (punch striking steel threw out sparks; plaintiff complained to manager who said he would probably not see anything like it again. Jury); *Allen v. Gilman McNeil & Co.*, 127 Fed. 609 (plaintiff ordered to remove unexploded blast and told there was no danger though plaintiff knew there was some. Jury).

p. 539, n. 131. *Poorman Silver Mines of Colo. v. Devling*, 81 P. 252 (plaintiff required to examine for missed shots: he and foreman examined place and latter said it was all right and to drill out hole. Court); *Shaver v. Home Tel. Co.* [Ind. App.] 75 N. E. 288 (telegraph poles piled on car and held by wire fastened across top to uprights: foreman told plaintiff to cut wire and poles fell. Although there was an order, rule as to assurance of safety does not apply where, as here, danger is obvious. Court); *McClusky v. Garfield & Proctor Coal Co.*, 180 Mass. 115 (plaintiff complained of condition of coal hole and suggested a remedy and foreman said he would fix it in a minute, with which plaintiff acquiesced. Court); *Tanner v. New York, N. H. & H. R. Co.*, 180 Mass. 572 (plaintiff bound to know that pole might be decayed was told to cut guy wire. Court); *Burke v. Davis*, 191 Mass. 20 (girl complaining of danger and thinking that work was more dangerous than foreman said, was ordered to work on mangle. Court); *Hannigan v. Smith*, 26 App. Div. 176, 50 N. Y. S. 845 (plaintiff complained of bricks falling and fore-

man said some time he would fix it. Court); Greenwood v. Island Coal Co., 26 Ind. App. 425.

Section 114. Assumption of Risk by Continuance at Work.*

p. 540, n. 133. Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492; Gunning System v. Lapointe, 212 Ill. 274; Illinois Cent. R. Co. v. Fitzpatrick [Ill.] 81 N. E. 529; Morden Frog & C. Works v. Fries [Ill.] 81 N. E. 862; Dunkerley v. Webendorfer Mach. Co., 58 A. 94; Giebell v. Collins Co., 54 W. Va. 518; Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417; Shaw v. Manchester St. R. Co. [N. H.] 58 A. 1073 (too few cars); Tucker v. Northern Terminal Co., 41 Or. 82; Grout v. Tacoma E. R. Co., 33 Wash. 524 (insufficient force). Immaterial how danger arose or how plaintiff learned of it. Murphy v. Grand Trunk R. Co. [N. H.] 58 A. 835.

p. 543, n. 138. And in New York. Dowd v. New York, O. & W. R. Co., 170 N. Y. 459.

p. 543, n. 139. But see Osborne v. Alabama S. & I. Co., 135 Ala. 571, cited *infra*, n. 187; St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495, cited *infra*, n. 195.

p. 544, n. 141. The risk must be clearly appreciated. Brooke v. Ramsden, 63 L. T. (N. S.) 287.

p. 545, n. 146. Urquhart v. Smith & Anthony Co., 192 Mass. 257 (ice). Compare Kline v. Abraham, 178 N. Y. 377 (slipping on marble stairs).

p. 545, n. 150. Bryce v. Burlington R. Co. [Iowa] 104 N. W. 483 (servant is not obliged to abandon the service upon the instant he knows of the defect).

* 6 Curr. Law, 574.

p. 548, n. 153. See New York Statute, *infra*, § 117 and appendix.

p. 548, n. 154. And New York, § 114g. But the recent Massachusetts cases seem to be drawing away from this rule. See § 114b.

p. 553, n. 159. "A servant is not compelled to begin or to continue to work for his master. Ordinarily, he does not work for him under a contract for a stated time. He is at liberty to retire from his employment, and his master is free to discharge him at any time. The latter constantly offers him day by day his wages, his place to work and the appliances which he is to use. The former day by day voluntarily accepts them. By the continuing acceptance of the work and the wages he voluntarily accepts and assumes the risk of the defects and dangers which a person of ordinary prudence in his place would have known." *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495, 501, citing cases.

Section 114a. England.

Section 114b. Massachusetts.

p. 570, n. 174. *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257 (icy walk. Jury). See *Moylon v. D. S. McDonald Co.*, 188 Mass. 499, cited n. 176.

p. 571, n. 176. *McAuliffe v. Gale*, 180 Mass. 361 (plaintiff, experienced, had worked several months near a planer, put into room after he was employed, which threw chips and sawdust several feet. Chip flew in his eye. Court); *Dobbins v. Lang*, 181 Mass. 397 (boy finding box in way of treadle of machine tried to find defendant to have it removed as he feared his

foot might catch on it. "Not finding the person whom he sought he went back to the machine and resumed work perfectly aware of the danger. This was not due care and was an assumption of the risk. He was old enough and intelligent enough to have known better and as he acted under neither ignorance nor constraint he has no cause of action." Court); *Moyle v. D. S. McDonald Co.*, 188 Mass. 499 (boy operating elevator injured by its jolting caused by defective guides. He had reported to superintendent and testified that there always seemed to be something the matter with it. The guides were not visible save on inspection. "If he assumes the risk by his conduct still it must be shown that he knew of and appreciated the danger, to which he voluntarily exposed himself." Jury); *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580 (plaintiff knew that elevator ran unevenly, and, had the machinery been visible, he was capable of appreciating the danger Jury). *Cooney v. Commonwealth Ave. St. R. Co.* [Mass.] 81 N. E. 905 (plaintiff knew of motorman's incapacity but it did not necessarily follow that he appreciated that this incapacity would lead motorman to disobey specific orders. "Under such circumstances it cannot be said as matter of law that a servant voluntarily takes the risk of the subsequent accident, as the conduct of the servant also must be found to have been accompanied by a voluntary purpose to expose himself to a danger which he appreciates. It, therefore, became a question of fact for the jury to determine under proper instructions whether the plaintiff voluntarily placed himself in this position"). See, also, *Wagner v. Boston El. R. Co.*,

188 Mass. 437. The Massachusetts court has refined overmuch upon the question whether a servant, knowing that there was some risk, appreciated it. In every day experience a man who knows that there is some danger in the condition he has to meet can seldom forecast precisely when or how this danger may work injury to him, yet his conduct must be governed by this uncertain knowledge and appreciation. The court has been inclined to make this issue of appreciation the turning point in its decision and in effect to hold that, unless the servant fully apprehended the extent of the danger and just how injury might come to him, he did not assume the risk of it. (See the ice cases of *Fitzgerald v. Connecticut R. P. Co.* and *Urquhart v. Smith & Anthony Co.*) This is a higher degree of appreciation of risks than common experience warrants. But even if a servant absolutely appreciates a risk, it does not necessarily follow that by remaining at work he is volens to assume it, and this latter issue still remains a question of fact to be determined by the court or by the jury according to the conclusiveness of the evidence or inferences to be drawn from his conduct. In making the turning point of the case the issue of appreciation rather than the issue of volens, the court has placed the emphasis on the less important issue and has established a higher standard of appreciation and more certain inferences from the plaintiff's conduct than seems reasonable. The most recent cases, however, like the earliest ones, seem to shift the emphasis from the issue of appreciation to the issue of volens, and it is not now a far step for the court to say that, whether the servant appreciated only what an average man might appreci-

ate or appreciated all about a risk caused by the master's default which is possible to forecast, nevertheless his conduct in remaining at work does not as a matter of law necessarily show that he was volens to incur it, but the inferences to be drawn from such conduct are as a usual thing so conflicting, depending as they do upon the character and degree of danger, the nature of his work, whether his safety is in his own hands, his fear of discharge or other elements of constraint, that only a jury can pass on them. *Supra*, §§ 107, 114, 114a, *infra*, § 115. But as acts and circumstances and not secret motives must be the test, it by no means follows that the court is not frequently justified in ruling as matter of law upon this issue.

Section 114c. Indiana.

p. 576, n. 179. *Hollingsworth v. Chicago I. & L. R. Co.*, 160 Ind. 259 (low bridge struck brakeman. Court); *Avery v. Nordyke-Marmon Co.*, 34 Ind. App. 541 (fall of pile of iron. Jury).

p. 576, n. 180. *Crown v. North Vernon Pump Co.*, 34 Ind. App. 253.

p. 577, n. 182. *Avery v. Nordyke-Marmon Co.*, 34 Ind. App. 541.

Section 114d. Alabama.

p. 578, n. 187. *Osborne v. Alabama, S. & I. Co.*, 135 Ala. 571. "Mere continuance in the service for which he was employed, though with knowledge of such defects and dangers, cannot, as between him and the employer, be accounted an act of negligence. The em-

ployer cannot treat as a breach of duty, but is held to sanction, that which by contract of employment he has required the employe to do. . . . The decisions in *Mobile R. Co. v. Holborn*, 84 Ala. 133, and *Highland Ave. Co. v. Walters*, 91 Ala. 435, though correct on the point to which we have cited them (continuing voluntarily to incur known risk) have been in effect overruled so far as they held that the employers' liability act operated as between employer and employe to abrogate the doctrine of *volenti non fit injuria*. That doctrine is founded on the consent express or implied of the employe to take the chances of injury or escape from a threatening situation, but such consent is not implied unless the danger is obvious or is known to the employe."

p. 578, n. 188. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112 (retrial).

Section 114e. Colorado.

p. 580, n. 192. *Cripple Creek S. & O. Co. v. Souza*, 86 P. 1005 (standing where flying bits of steel hit him. Court).

Section 114f. Federal Courts.

p. 581, n. 195. "A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment. Among the risks and dangers thus assumed are those which

arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use." Girl caught in gears. Court. St. Louis Cordage Co. v. Miller [C. C. A.] 126 Fed. 495, 508, citing many cases.

p. 582, n. 196. Bunker Hill M. & C. Co. v. Kettleson [C. C. A.] 121 Fed. 529 (working on inclined chute without a rope that had been fixed for him. Court); Musser-Sauntry L. L. & Mfg. Co. v. Brown [C. C. A.] 126 Fed. 141 (working with short handled axe and had requested a larger one. Court).

Section 114g. New York.

p. 583. For a consideration of the New York statute relating to assumption of risk by continuance at work, see *infra*, §§ 117, 118, and Appendix. The rule at common law has been thus stated "If (the servant) voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him." Planer. Crown v. Orr, 140 N. Y. 450. "By continuing at work, with no prospect of a change of method, he waived such dangers as he subsequently discovered. The doctrine of assumed risks rests upon the implication of a promise by the employe to waive the consequences of dangers of which he is fully aware." Kicking cars. Dowd v. New York, O. & W. R. Co., 170 N. Y. 459. "The rule of the assumption of obvious risks does not rest wholly upon the implied agreement

of the employe, but on an independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts." Tree near track. *Drake v. Auburn City R. Co.*, 173 N. Y. 466. "It is not necessary to refine over much for the purpose of ascertaining whether this principle rests on an implied contract or a distinct act of waiver or on the two combined. The gist of the principle is that where the employe, fully appreciating the dangerous condition of the appliance or of certain machinery, or a method of doing the work in all its aspects, elects to continue in the employment and take his chances of receiving injury from the known dangerous condition, he is estopped from mulcting the employer in damages for injuries inflicted because of such defective appliance or method. He willingly continues in the employment with the dangers in full measure before him, and the rule that the master must first perform his duty before the doctrine of the assumption of risks arises is not applicable." Rule that trains need not be protected by flagmen. *Field v. New York Cent. & H. R. R. Co.*, 86 App. Div. 148, 83 N. Y. S. 535. Where plaintiff knew danger from firing uncovered blasts he assumed the risk at common law by remaining in the employment. *O'Neill v. Karr*, 110 App. Div. 571, 97 N. Y. S. 148. Plaintiff knew soft instead of hard wood was used and assumed the risk. *Freeman v. Dennison Mfg. Co.*, 40 App. Div. 99. Knowing of defective brake but remaining at work without complaint. Court. *Wright v. Delaware & H. C. Co.*, 40 Hun, 343. Knowing of defective brake but remaining at work. Court. *Windover v. Troy City R. Co.*, 4 App. Div. 202. Knowing of defective

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derrick car but remaining at work. Court. *Horrigan v. New York Cent. & H. R. R. Co.*, 7 App. Div. 377. For other cases, see §§ 95, 96. No distinction seems to be made between risks existing at the time of accepting employment and those afterwards arising so far as the servant's knowledge and appreciation of them goes and, therefore, reference may be made to cases cited *supra* §§ 95, 96. With risks arising after the employment is accepted regard must be had however to the fact that the servant is entitled to rely on the master's care in fulfilling the duties cast upon him and may also trust to assurances of safety given him. These matters affect his appreciation of the risk and where they appear it cannot be found as a matter of law that the servant knew and appreciated the danger. *Supra* §§.111-113. Thus where the servant a boy of eighteen was moving gravel with a horse and cart and the harness was not provided with a girth to prevent the cart from tipping up and he called the foreman's attention to it and asked for a piece of rope, but the foreman replied that he had none and for him to go on with his work, it was held that he continued to use the unsafe appliances by the order of the defendant and could not be said to be fully aware of the effects to be expected from obeying such order: that this was a question for the jury and he did not assume the risk by continuing at work. *Smith v. King*, 74 App. Div. 1, 77 N. Y. S. 3. Before the question of the effect to be given by the servant's continuance at work arises it must appear that he fully knew and appreciated the danger. Where plaintiff knew that the kind of hook used on a chain to raise pots of acid had been changed,

it did not follow that he knew the danger which the change involved, and though the hooks were simple appliances it would be going too far to hold that a common laborer should have foreseen the risk of using them. Unless he knew and appreciated the risk his continuance in the employment is not an assumption of it. *Wells v. Celluloid Co.*, 175 N. Y. 401. Where it does appear that the servant appreciates the risk the New York court apparently holds that only one inference can be drawn from such continuance and that is the inference of a waiver of the consequences of the danger, or a voluntary acceptance of the risks. The servant's course is marked out by this statement "if, in his opinion, there was peril . . . it was his duty to have retired from the employment. As he failed to do this, it must be held that he assumed whatever risk there was in the situation." *Drake v. Auburn City R. Co.*, 173 N. Y. 466. Although it has been said that the employe must "continue in the service without objection or complaint," (*Crown v. Orr*, *supra*) yet it would appear that no objection or complaint made by the servant will be of avail to relieve him of the inference which his conduct of continuing in the employment is held to raise. Thus where plaintiff working on an old press asked to have it improved and was told to work on it or get out, it was held that his continuance to work was an assumption of the risk as a matter of law, though this case is not perhaps authority for the broad proposition since the machine was in the same condition when the plaintiff first entered the employment and undertook to work on it. *Sweeney v. Berlin & J. Envel. Co.*, 101 N. Y. 520. Where however a ser-

vant complained of falling bricks in the building where he worked, but received no promise of remedy, he could not recover as a matter of law. *Hannigan v. Smith*, 26 App. Div. 176, 50 N. Y. S. 845. And see *supra*, § 107. When, however, the complaint or objection results in a promise to remedy the condition a different question is presented and continuance at work in such circumstances is not an assumption of the risk. *Infra*, § 115. The rigor of the rule as to the assumption of obvious risks is somewhat modified because of the holding that "the burden of showing that the servant assumed the risk of obvious dangers rests upon the master and hence we cannot say, as a matter of law, that a jury, in the case before us, was compelled to find that the plaintiff's intestate knew or should have known of the practice of kicking cars on a track where car repairers were at work." *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459. So where a spinner was injured by breaking of a belt fastened in a certain manner it was held that the burden of showing the servant's knowledge and appreciation was on the defendant and the question was for the jury. *Devereaux v. Utica, S. C. Mills*, 84 App. Div. 34, 82 N. Y. S. 145. This rule of pleading is considered, *supra* § 87. The rule seems not yet to have been closely analyzed. It deals rather with the servant's knowledge and appreciation than with the possibility of conflicting inferences to be drawn from his conduct in continuing at work, and it seems to make no distinction between risks which exist when the employment is first accepted and those which may arise from the master's negligence during the continuance of the employment. Whether or not the common-law

rule of assumption of risk by continuance at work still exists or has been abrogated by § 3 of the Employers' Liability Act is an open question. *Infra*, § 117.

Section 115. Promise to Repair.*

p. 585, n. 201. "Although the courts of this state (New York) have not hitherto had occasion to definitely adopt the rule under which a servant may be relieved from an assumed risk of his employment by the master's promise to remove the danger which creates the risk, the rule is so generally recognized as a part of the jurisprudence of this country, and is so strongly supported by reason and justice, as to justify its adoption by this court. At this point the question arises, however, whether the rule shall be adopted without qualification, or as limited by some of the courts and particularly by the Appellate Division, from whose order this appeal is taken. (The Appellate Division making a distinction between a promise to be performed at a fixed time, *infra*, n. 211). Since, under our construction of the master's promises herein, it may fairly be said to fall within the general rule without qualification: and in view of the fact that under the so-called Employers' Liability Act (ch. 600 L. 1902) now in force, the rule above adverted to may in the future present a question of purely academic interest, we do not now decide the general question whether it would be wiser to adopt the rule in its entirety or as modified by the limitation referred to." *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. S. 49;

* 6 Curr. Law, 577.

Id., 174 N. Y. 385. "The master's inducing promise to repair, from being only a fact to be considered by the jury on the question of fact whether the servant assumed the risk of the defect (or was guilty of contributory negligence, as it is otherwise expressed) by continuing at work . . . has evolved in this state into a contract relieving the servant of the risk and assumption thereof as a matter of law." *Citrone v. O'Rourke E. Const. Co.*, 99 N. Y. S. 241; Id., 80 N. E. 1092. Plaintiff's complaint counting on a promise to repair was dismissed on the ground that only an action for breach of contract would lie. Held error. "The effect of the master's promise to pay damages in case of injury is a waiver of the right to assert as a defense the fact of the assumption of the risk by the servant, while at the same time it is tantamount to the actual assumption of such risk in respect to the financial consequences of his negligence by the master himself as the conscious wrongdoer. . . . While there could be no recovery save for the promise, the recovery is not upon the promise, but because of the negligence which occasioned it. . . . The assumption of risks of service operates as a waiver of the negligence of the master, and the burden of proving such waiver rests upon the latter. He cannot successfully bear that burden where he has expressly agreed to compensate his servant for the injuries incident to the risk, especially where the risk has been created by his own conceded negligence . . . it is difficult to see why he may not logically be also liable in an action for negligence where he voluntarily becomes in some degree the insurer or guarantor of such safety by the precise terms of the contract of employ-

ment.” *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. S. 133. It seems unnecessary to call, as do the above cases in New York, upon the phraseology or reasoning relating to contracts to settle the rights of the parties: that there is no real contract involved appears from the case of *Obanhein v. Arbuckle* above cited. The question is merely what inferences are to be drawn from the servant's conduct in the face of a known and appreciated risk caused by the master's fault. Does his conduct in such a case bring him within the maxim *volenti non fit injuria*? If, knowing and appreciating the risk, he elects to continue at work, being free to quit if he chooses, it is generally held that such conduct shows that he was *volens* to undertake it. If on the other hand he complains and expresses unwillingness to undertake it, but is induced to do so for a short time in the hope, inspired by the master, that the risk will be done away with, it cannot be said that he is *volens* to undertake it for his whole conduct shows the contrary. A person who is willing to undertake a known and appreciated risk, whether he be a servant or a stranger, cannot hold another liable for the resulting damage: and where the principle of law is plain, to attempt to spell out a contract or to decide the matter in the terms of a fictitious contract seems to raise more questions than it quiets. See, also, *Andresik v. New Jersey Tube Co.* [N. J.] 63 A. 719; *Dempsey v. Sawyer*, 95 Maine, 295; *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495, citing cases.

p. 586, n. 202. *Baumwald v. Trenkman*, 88 N. Y. S. 182 (axle pin in iron car used to wheel ashes slipped out. Plaintiff had complained of it and defendant

had promised to repair but failed to do so. Held a simple appliance to which the general rule does not apply. Court); *Hempstock v. Lackawanna I. & S. Co.*, 98 App. Div. 332, 90 N. Y. S. 663 (foreman hurt by defective scaffold having a weak brace. The rule does not apply to the selection of material. Court). But see *Cudahy Packing Co. v. Skonmal* [C. C. A.] 125 Fed. 470 (hammer). "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and danger incident thereto or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master." *Weak bulletin board*. Court. *Gunning System v. Lapointe*, 212 Ill. 274; *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273; *Louisville Hotel Co. v. Kaltenbrun* [Ky.] 80 S. W. 1163 (leaky box in laundry). *Morden Frog & C. Works v. Fries* [Ill.] 81 N. E. 862 (punching machine not within this rule).

p. 586, n. 204. See *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. S. 49; *Id.*, 174 N. Y. 385, cited *infra*, n. 201; *Alton Roller M. Co. v. Bender*, 112 Ill. App. 484 (asked for helper and was refused. Court).

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p. 587, n. 206. Engineer complained of unprotected lubricating tubes and asked foreman to repair them who replied "Well, they must be fixed." Question for jury whether this amounted to a promise and whether plaintiff was thereby induced to remain. *Cincinnati, N. O. & T. P. R. Co. v. Robertson* [C. C. A.] 139 Fed. 519. Plaintiff asked foreman that certain changes be made in boat and he replied that he would attend to it in a few days when boat was hauled out. Question for jury whether this was a promise on which plaintiff could rely. *Barney Dumping Boat Co. v. Clark* [C. C. A.] 112 Fed. 921. Machine boss promised certain servants to repair a truck. Plaintiff objected to using it and these servants told him of the boss' promise. Held he might rely on a promise so made and communicated. *Odin Coal Co. v. Tadlock* [Ill.] 75 N. E. 332. Plaintiff complained of poor daylight and foreman said "never mind it will soon be light enough." Held not a promise but merely an assurance that the natural supply would be better. *Buchner v. Creamery P. Mfg. Co.*, 124 Iowa, 445. Plaintiff complained of danger of bricks falling and foreman said that some time he would fix it: no promise on which plaintiff could rely. Court. *Hannigan v. Smith*, 26 App. Div. 176, 50 N. Y. S. 845. Plaintiff complained of working with incompetent servant and foreman said "All right you go ahead where you are." For jury whether plaintiff might believe that he would not be required to work near servant. *Allcot v. Kirkham*, 101 App. Div. 77, 91 N. Y. S. 775. Engineer discovered a defective step on his engine and reported it on a book kept for the purpose. Before using engine again he looked

at book and saw that his complaint had been erased which indicated to him that it had been repaired. It had not and he might recover. *Mexican Cent. R. Co. v. Henderson* [C. C. A.] 114 Fed. 892.

p. 587, n. 207. Not necessary that plaintiff should threaten to quit unless repair is made. *Anderson v. Seropian*, 147 Cal. 201; *Morden Frög & C. Works v. Fries* [Ill.] 81 N. E. 862.

p. 588, n. 209. *Terre Haute Elec. Co. v. Kieley*, 35 Ind. App. 180 (foreman). "If in fact the foreman had no authority to make the promise yet if he assumed to have it and the plaintiff reasonably reposed in the assumption, so that he could reasonably think that he had the authority his promise, if made, would excuse the plaintiff for remaining a reasonable time in reliance upon it." *Barney Dumping Boat Co. v. Clark* [C. C. A.] 112 Fed. 921. The promise must be made by the master or his representative: a promise made by a fellow-servant is not sufficient. Thus, where the engineer in a hotel promised a laundress that a defective mangle would be repaired, the plaintiff showed no authority to the engineer to make such promise and offered no evidence of acts done or words spoken by defendant that would lead plaintiff to believe that engineer had authority, nor did engineer's position or work import such authority and plaintiff could not recover. *Court. Spencer v. Haines* [N. J.] 64 A. 970. Question of servant's authority is for jury where there is some disputed evidence of it. *Burch v. Southern Pac. Co.*, 145 Fed. 443. Fireman may rely on promise of engineer to have step repaired. *Gulf C. & S. F. R. Co. v. Garren* [Tex. Civ. App.] 72 S. W. 1028. Plaintiff,
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foreman of rivetters, complained to foreman of carpenters that the scaffold on which he was working had a weak brace and received promise of repair. The rule "does not apply where, as in the case at bar, the promise to repair relied upon was made by a foreman of one of many gangs of men all engaged in the prosecution of one enterprise for a common master to a foreman of another one of such gangs; otherwise, by an interchange of such promises by the several foremen, all would be relieved from the assumption of risk without the knowledge of the master. . . . The assumption of risks by an employe rests upon a contract, express or implied, and it can only be removed or eliminated by like contract." Foreman not authorized to make a contract. *Hempstock v. Lackawanna, I. & S. Co.*, 98 App. Div. 332, 90 N. Y. S. 663. This holding is consistent with the expressions in the New York cases, as to which see *supra*, n. 201, but whether it is right or not would seem to depend upon the question whether the foreman of carpenters was charged with the master's duty of providing a safe place to work, if so his promise to make the place safe, having power to do so, should relieve the plaintiff from the inference of consent raised by his remaining at work.

p. 588, n. 211. The cases cited in this note have been overruled by *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 114 (where the promise was "to repair said saw and table as soon as the job of work that said company was working on was completed," and plaintiff being hurt before the expiration of that time was held not to have assumed the risk). Where the terms or form of the promise to repair are such as to lead the servant

to believe that the repairs may be made at any moment, that is, when the time for performance of the promise is not fixed but is left indefinite, the servant by continuing at work from the moment the promise is made is not considered to have taken the risk upon himself or to have waived the master's default for such time as it is reasonable for him to expect the repairs to be made: after a reasonable time has elapsed and the repairs have not been made he is held to have assumed the risk. As to reasonable time, see *infra*, nn. 213-215. *Barney Dumping Boat Co. v. Clark* [C. C. A.] 112 Fed. 921 (plaintiff wanted certain changes made in boat and superintendent replied that he would attend to it in a few days when the boat was hauled out. Jury question whether this was a promise on which plaintiff could rely: and reliance from time of making promise); *Burch v. Southern Pac. Co.*, 140 Fed. 470 (not necessary that a certain time be fixed for repair as a reasonable time will be implied in the absence of an express agreement); *Victor Coal Co. v. Dunbar*, 120 Ill. App. 288 (mule driver had daily complained of vicious mule and was daily promised that another would be given him); *Gunning System v. Lapointe*, 212 Ill. 274 (a promise indefinite as to time entitles servant to rely upon it for a reasonable time); *Huggard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475 (plaintiff complained and foreman said: "I will see to that and have it fixed"); *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.* [Wis.] 107 N. W. 463 (foreman promised to have barrier put at mouth of shaft). *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. S. 49; *Id.*, 174 N. Y. 385 (plaintiff complained on Sat-

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urday to defendant's treasurer of means of stopping a machine on which he had worked in the same condition for a year and treasurer said they would put a belt shifter on when the mill would be shut down "the fore part of the week." Plaintiff remained at work and on Wednesday was hurt. The appellate court, saying that assumption of risk was based upon contract, thought that by the complaint and promise the plaintiff expressly stipulated to operate the dangerous machine for at least two or three days precisely as he had impliedly stipulated to do and had done for a year previous, but with the assurance that at the end of two or three days it would be made reasonably safe, and that pending the performance of the promise he assumed the risk. The court of appeals construed the promise to be indefinite that the plaintiff, a common laborer, could not know when it was intended to shut the mill down and "forepart" was applicable to Monday, Tuesday, or Wednesday, and he may well have gone to work on Monday morning in the belief that the mill might be shut down at any moment. The promise, if not strictly the equivalent of a promise to repair at once, is capable of a construction that it was to be fulfilled within a reasonable time and, if that is true, the plaintiff was justified in remaining during that reasonable time, covered by the defendant's promise, and the risk theretofore voluntarily accepted by the plaintiff was assumed by the defendant. (Judgment for plaintiff.) In this case the risk was apparently one existing when the plaintiff first accepted the employment, and consequently the defendant was not negligent in regard to it. It would seem, there-

fore, that whether there was a promise or not, (unless the "contract theory" is accepted in its entirety, as a real contract requiring consideration and the like), the defendant could not be held liable because he was not negligent. *Louisville Hotel Co. v. Kaltenbrun* [Ky.] 80 S. W. 1163 (when promise fixes no time it is to be performed within a reasonable time); *Fouts v. Swift & Co.* [Mo. App.] 88 S. W. 167 (promise to guard electric fan as soon as he could get around to it); *Dowd v. Erie R. Co.*, 70 N. J. Law, 451 (promise to fix guard as soon as he could); *Gray v. Red Lake Falls L. Co.*, 85 Minn. 24 (promise to replace incompetent servant and plaintiff might rely on it for a reasonable time). Where the terms or form of the promise to repair fix a definite time for the performance of the promise, the courts are not in accord whether the plaintiff assumes the risk from the time of making to the time of performing the promise, or whether pending its performance he is relieved of the risk. (If the promise is not fulfilled at the time set for its performance the plaintiff by remaining at work thereafter assumes the risk.) *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. S. 49; *Id.*, 174 N. Y. 385, construed a promise to repair when the mill was shut down "the forepart of the week" to be an indefinite promise upon which the plaintiff might rely for a reasonable time from the moment of making and did not find it necessary to determine what the risk would be were the time of performance fixed. *Citrone v. O'Rourke Eng. Const. Co.*, 99 N. Y. S. 241 (plaintiff at 8:30 a. m. working in a trench complained that stones might fall on him and foreman replied for him to go to work and after din-

ner he would fix it. The plaintiff went to work there and was injured at 10:30 a. m. Held for plaintiff. It was contended that the agreement of assumption of risk made by the master did not begin to run until after dinner, but the contrary is inherent in the words and purpose. The promise was to induce the servant to resume work until dinner time. "If the promise be to do the repairs presently, or within no fixed time, the agreement subsists for a reasonable time only, but if the parties fix the period of its duration, it of course applies during that period." Dissenting opinion thought that the risk was assumed by servant pending performance of promise); *Swarts v. R. M. Wilson Mfg. Co.*, 100 N. Y. S. 1054 (plaintiff complained of dangerous nature of machine he had long operated, on Monday, and threatened to leave. Defendant promised to change the machine on Saturday and plaintiff remaining at work was hurt on Thursday. Held for plaintiff); *McClusky v. Garfield & Proctor C. Co.*, 180 Mass. 115 (experienced servant unloading coal said: "Why not take a few shovels full out forward and put it on a level and make more room," and foreman answered: "I will in a minute," to which plaintiff said: "All right." Not an assurance that place was safe or would be made safe at once and plaintiff took the risk. Court); *Cudahy Packing Co. v. Skonmal* [C. C. A.] 125 Fed. 470 (plaintiff given a too highly tempered hammer complained and told to finish the job on which he was at work when a new hammer was to be supplied him. Held for plaintiff); *Anderson v. Sero-pian*, 147 Cal. 201 (plaintiff complained of defective press and was told "just as soon as you get far enough

ahead with the material for the box makers to work on, then we will fix the machine." Held for plaintiff: the promise is not indefinite for both parties must be taken to have understood the time); *Dempsey v. Sawyer*, 95 Maine, 295 (plaintiff told to work until some time in forenoon when saw would be fixed. Jury); *Gunning System v. Lapointe*, 212 Ill. 274 (the plaintiff by remaining at work after the time fixed for the performance of the promise assumes the risk); *Andresik v. New Jersey Tube Co.* [N. J.] 63 A. 719 (plaintiff at 10 a. m. complained that his machine was out of order and foreman said "you go right ahead with the work. We are overloaded with work, and at the noon hour I will fix this for you." It was not fixed at noon but plaintiff kept at work and was hurt at 3 p. m. Risk assumed. Court. "Where the promise to make the repair is indefinite or inferential as to the time of the performance, there may arise a question for the jury of reasonable time—on the part of the master for performance and consequently on the part of the servant for continuing to incur the risk in the expectation that the master will perform. Where, however, the promise is express as to time of performance, the rule is otherwise. A promise made by the master, acted upon by the servant, to repair a specified defect at a definite time thereafter, creates an assumption of risk by the master. This assumption of risk begins forthwith upon the making of the promise, and continues thereafter and throughout the period fixed for the making of the repair: but this undertaking of the master terminates and his liability thereunder ceases at the end of that period.

The termination of the master's undertaking and the termination of the period fixed for repair are identical. In such case, it would be error to submit to the jury any question relating thereto which would enable the jury to find, in conflict with the terms of the contract, that the responsibility on the part of the master still existed after the expiration of the period during which the master agreed to undertake it. As a rule whether the promise is general or definite is a question for the court.") The weight of both reason and authority lead one to the view that the only distinction to be made between a promise for an indefinite and for a definite time of performance is that in the former it is a fact in issue when the promise is to be fulfilled and consequently when the plaintiff begins to assume the risk by remaining at work, and in the latter this time is fixed. In either case the plaintiff does not assume the risk from the time the promise is made to the fixed date for performance or if no date is fixed then for a reasonable time for performance after the promise is given. In each case the plaintiff by his complaint or refusal to work has shown that as a matter of fact he is not "volens" to take the risk or waive the consequences of the master's negligence. See *supra*, note, 201.

p. 590, n. 212. "In the absence of some showing that the complaint was made on behalf of some other person, it will be presumed that it was made on behalf of the person making it, and for his own benefit. Naturally if one makes complaint to his superior of an existing situation, it will be inferred that he is making it on behalf of himself, and not for some one

else." *Huggard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475; *Morden Frog & C. Works v. Fries* [Ill.] 81 N. E. 862. It must be fairly inferable that plaintiff complains on his own account. *Anderson v. Seropian*, 147 Cal. 201; *Alton Roller M. Co. v. Bender*, 112 Ill. App. 484. Where plaintiff had been in the habit of wedging movable runway to make it firm, and complained to superintendent about its condition, who responded that he would see to it, it was held that there was no evidence that he relied on the promise, which is a necessary element in the promise to repair rule. *Daily v. Fiberloid Co.*, 186 Mass. 318. That promises had been often made and as often broken does not prevent plaintiff from continuing to work on the faith of them. *Victor Coal Co. v. Dunbar*, 120 Ill. App. 288. Where the promise was made to other servants who, when plaintiff complained told him of it, the plaintiff was justified in relying upon it. *Odin Coal Co. v. Tadlock* [Ill.] 75 N. E. 332. Plaintiff may testify that he relied on the promise. *Huggard v. Glucose Sugar Ref. Co.* [Iowa] 109 N. W. 475.

p. 590, n. 213. See cases cited *supra*, n. 211.

p. 591, n. 214. *Anderson v. Fielding*, 92 Minn. 42. Servant may remain without assuming risk for so long only as one may reasonably expect that promise will be performed.

p. 591, n. 215. *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 139 Fed. 519 (engineer worked eight days after receiving promise of fixing unguarded lubricating tubes on locomotive. Jury); *Crookston Lumber Co. v. Boutin* [C. C. A.] 149 Fed. 680 (defective log carriage; but plaintiff guilty of negligence); *Huggard*

v. Glucose Sugar Ref. Co. [Iowa] 109 N. W. 475 (worked nine days after receiving promise to fix hole in floor. Jury); Buchner v. Creamery P. Mfg. Co., 124 Iowa, 445 (worked two days after promise to guard cog wheels. Jury); Gunning System v. La-pointe, 212 Ill. 274 (worked four days after receiving promise to repair a weak bulletin board. Unreasonable time. Court); Heathcock v. Milwaukee-Platteville L. & Z. M. Co. [Wis.] 107 N. W. 463 (unguarded mouth of shaft in that condition forty days before complaint, then plaintiff worked seven days after receiving promise. Barrier could have been built in half a day. Unreasonable time. Court); Tannhauser v. W. E. Uptegrove & Bro., 100 N. Y. S. 245 (worked two days on saw after receiving promise to repair "pretty soon." Jury); Collins v. Harrison [R. I.] 56 A. 678 (servant promised that roof of her room would be repaired and remained for seven days. Jury).

p. 592, n. 216. Engineer having reported a defective step on engine in a book kept for the purpose, and before using engine again, upon looking in the book saw that complaint had been erased thus indicating that the repair had been made, made no inspection to see whether defect had been actually repaired or not. Jury. Mexican Cent. R. Co. v. Henderson [C. C. A.] 114 Fed. 892.

p. 592, n. 218. Monarch M. & D. Co. v. Devoe, 85 P. 633 (untimbered shaft; plaintiff worked two days after complaint when rock fell: testified that place looked dangerous and that a rock could fall but did not testify that it would. Not negligent); Obanhein v. Arbuckle, 80 App. Div. 465, 81 N. Y. S. 133 (circular
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saw wobbled. Jury); *Tannhauser v. W. E. Uptegrove & Bro.*, 100 N. Y. S. 245 (saw. Jury); *Roccia v. Black Diamond C. M. Co.* [C. C. A.] 121 Fed. 451 (plaintiff employed to timber mine asked and was promised help. Jury); *Musser-Sauntry L. L. & Mfg. Co. v. Brown* [C. C. A.] 126 Fed. 141 (using short handled axe to knock hook out of chain which bound logs. Court); *Crookston Lumber Co. v. Boutin* [C. C. A.] 149 Fed. 680 (standing where defective log carriage could creep upon him. Court); *Anderson v. Seropian*, 147 Cal. 201 (cannot continue at work if it is so obviously dangerous that a prudent man would not do so); *Gunning System v. Lapointe*, 212 Ill. 274 (cannot continue at work if it is so obviously dangerous that a prudent man would not do so).

p. 593, n. 219. *Going v. Alabama S. & I. Co.*, 141 Ala. 537 (stick to wedge belt shifter); *Monarch M. & D. Co. v. Devoe*, 85 P. 633 (untimbered mine); *Obanhein v. Arbuckle*, 80 App. Div. 465, 81 N. Y. S. 133 (circular saw); *Leaux v. City of New York*, 87 App. Div. 405, 84 N. Y. S. 511 (cover to sewer manhole broken); *Schermerhorn v. Glens Falls P. C. Co.*, 94 App. Div. 600, 88 N. Y. S. 407 (bands on lime kiln); *Allcot v. Kirkham*, 101 App. Div. 77, 91 N. Y. S. 775 (incompetent servant); *Barney Dumping Boat Co. v. Clark* [C. C. A.] 112 Fed. 921 (tiller of boat swung over deck); *Highland Boy G. M. Co. v. Pouch* [C. C. A.] 124 Fed. 148 (insufficient timbering in mine); *Southern Pac. Co. v. Hetzer* [C. C. A.] 135 Fed. 272 (incompetent servant).

p. 593, n. 220. *Terre Haute Elec. Co. v. Kieley*, 35 Ind. App. 180 (a promise to repair and injury caused
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by the defective appliance made out a prima facie case. Air brakes); *Crown v. North Vernon P. Wks.*, 34 Ind. App. 253 (complaint should allege that change would have avoided or lessened the danger. Chute for slabs thrown to furnace).

Section 116. Breach of Statutory Obligation.*

p. 599, n. 232. The rule laid down in the *Narramore* case that a risk created by violation of a statute is not assumed by a servant knowing and appreciating it has been adopted in the following cases. *Davis Coal Co. v. Polland*, 158 Ind. 607 (experienced miner knew roof was not propped in violation of statute. Held risk not assumed. "If a statute is a mere affirmation of the common-law duty of the employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. . . . If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the law makers believed that the operation of common-law rules did not afford the employe sufficient protection: that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employe did not stand upon a footing of equality with the employer in contracting for his safety: and that the necessity of earning the daily wage frequently constrained the employe to put

* 6 Curr. Law, 566.

up with defective place and tools, without complaint, by reason of his fear of the consequences of complaining. . . . How, then, can there be any lawful basis for an agreement, express or implied, that the employer shall violate the law, and that the employe shall be remediless? The doctrine of assumed risk, in its essential nature, constitutes a defense. . . . Such a contract, where the duty of the employer and the right of the employe are measured by the indefinite standard of care that a reasonably prudent person would have exercised under like circumstances, is enforceable. And so the heart of the present case is this: Is a contract enforceable by which the employe waives in advance his right of having, and relieves his employer of the duty of providing, the specific safeguards required by the statute? The statute does not, in terms, forbid the making of such a contract. . . . It is true . . . that the state cannot compel an injured employe to bring an action for damages, nor prevent his settling or dismissing it if begun. . . . The employe's right to control his lawsuit, however, does not touch the question of his right to bind himself in advance to absolve the employer from the performance of specific statutory duties. Freedom of contract should not be lightly interfered with. . . . But the state has power to restrict this right in the interest of public health, morals and the like. . . . If the legislature has clearly expressed its public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employe to waive in advance his statutory protection, the contract is

void as unmistakably as if the statute in direct words forbade the making of it. . . . If the employer may avail himself of the defense that the employee agreed in advance that the statute should be disregarded, the court would be measuring the rights of the persons whom the law makers intended to protect by the common-law standard of the reasonably prudent person, and not by the definite standard set up by the legislature. This would be practically a judicial repeal of the act. It is no hardship to the employer to disallow him a defense based on an agreement that he should violate a specific statutory duty"); *Monteith v. Kokomo W. E. Co.*, 159 Ind. 149 (circular saw unguarded in violation of statute. Complaint which is based on the statute need not deny plaintiff's knowledge of the condition of the saw or the dangers therefrom. The risk existed when plaintiff entered the employment. Held, upon a review of cases, that risk of breach of statutory obligation is not assumed); *Island Coal Co. v. Swaggerty*, 159 Ind. 664 (absence of elevator signals); *Green v. American Car F. Co.*, 163 Ind. 135 (unguarded steel hammer); *Buehner Chair Co. v. Feulner*, 164 Ind. 368 (unguarded drill); *Davis v. Mercer Lumber Co.*, 164 Ind. 413 (unguarded saw); *Diamond Block C. Co. v. Cuthbertson*, 73 N. E. 818, 76 N. E. 1060 (roof of mine); *Chicago & E. R. Co. v. Lawrence* [Ind.] 79 N. E. 363 (speed ordinance); *Brower v. Locke*, 31 Ind. App. 353 (card); *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398 (unguarded machinery); *Chamberlain v. Waggmire*, 32 Ind. App. 442 (unguarded vat); *American C. & F. Co. v. Clark*, 32 Ind. App. 644 (planer);

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Espenlaub v. Ellis, 34 Ind. App. 163 (unguarded saw); Nickey v. Dougan, 34 Ind. App. 601 (unguarded saw); Indiana & C. Coal Co. v. Neal, 75 N. E. 295 (coal mine act); Muncie Pulp Co. v. Hacker, 76 N. E. 770 (unguarded emery wheel); Inland Steel Co. v. Kachwinski [C. C. A.] 151 Fed. 219 (Ind. statute, "drop"); Hall v. West & Slade M. Co. [Wash.] 81 P. 915 (plaintiff knowing of unguarded condition of machinery, in violation of statute, and remaining at work held not to assume risk, on authority of Green v. Western American Co., 30 Wash. 87. Dissenting opinion collecting cases); Whelan v. Washington Lumber Co. [Wash.] 83 P. 98 (belt shipper, statute violated, risk not assumed); Miller v. Union Mill Co. [Wash.] 88 P. 130 (statute repealed after injury and before trial); Swick v. Aetna P. C. Co. [Mich.] 111 N. W. 110; Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288 (ladder maintained on side of freight car in violation of statute. Risk not assumed. If assumption of risk is part of the broader doctrine of *volenti non fit injuria* then where a statute imposes a duty and gives an action for its breach, the common-law rule must give way else no action could be had under the statute. If, however, the doctrine rests upon contract, then the policy of the law forbids one to contract away the statute). See, also, Greenlee v. Southern R. Co., 122 N. Car. 977 (with dissenting opinion); Sipes v. Michigan Starch Co. [Mich.] 100 N. W. 447. The rule laid down in the Narramore case has not been adopted in the following cases which hold that a servant knowing and appreciating a risk created by breach of a statutory obligation may assume it to the same extent as if no statute were involved (the statute of

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course not in terms taking away the defense as to which see *infra*, n. 237): *St. Louis Cordage Co. v. Miller* [C. C. A.] 126 Fed. 495, 509 ("The negligence of the master to safely and securely guard his machinery in accordance with the law of Missouri is of the same nature as his negligence in providing a reasonably safe floor or ax or other tool or appliance, and there is no reason why an action for a resulting injury should not be subject to the defense of assumption of risk in the one case to the same extent as in the other. . . . The factory act of Missouri does not abolish the defense of assumption of risk in cases in which the absence of the guards and the risks and dangers from the gearing and machinery are obvious or well known to the employe and he enters or continues in the service without complaint." Court. One judge dissenting said: "If such a duty can be evaded by voluntary agreements made by employers with their employes, and by implication only, then the existence of such agreements, where alleged, should be found by a jury"). See, also, *Glenmont Lumber Co. v. Roy* [C. C. A.] 126 Fed. 524 (Minnesota factory act). *Denver & R. G. R. Co. v. Norgate* [C. C. A.] 141 Fed. 247 (defendant violated Colo. St. requiring railroads to block frogs and plaintiff entered the employment after such violation. The court disapproving the statement in the *Narramore* case that assumption of risk is based on a contract express or implied held that it is imposed by the policy of the law upon those entering into the status of master and servant and that this defense is available where there has been a breach of statutory obligation. Citing cases). See, also, *American Lin-*

seed Co. v. Heins [C. C. A.] 141 Fed. 45, though the ground of the decision is contributory negligence. Also, Wheeler v. Oak Harbor H. L. & H. Co. [C. C. A.] 126 Fed. 348, and Michigan H. & H. Co. v. Wheeler [C. C. A.] 141 Fed. 61 (unboxed shaft under window in violation of statute, question of negligence and assumption of risk for jury). Also, Nottage v. Sawmill Phoenix, 133 Fed. 979. (Washington statute as to unguarded saw. Risk of violation may be assumed. "It is not true that the purpose of the statute will be defeated by a decision of a controversy between individuals involved in a civil action in accordance with the long-established rules of the common law.") Marshall v. Norcross, 191 Mass. 568 ("It appeared that no flooring had been placed between the seventh and fifth floors as required by St. 1901, c. 166, and it was contended that this fact was evidence of the negligence of the defendant. The judge, however, rightly charged that if this failure to cover by floors was apparent to the plaintiff and he appreciated the risk, then he assumed the risk. The plaintiff, who was an experienced workman . . . had been at work upon the building three weeks . . . and hence assumed the risk of danger arising from non-compliance with the statutes"); Martin v. Chicago R. I. & P. R. Co., 118 Iowa 148 (freight train violated speed ordinance. "We think the learned judge, in writing that opinion (Narramore case), assumed too much, in treating the assumption of risk as purely a matter of contract. . . . In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by stat-

ute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed and in the other may not. . . . Our study of this subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute"). See, also, *Helmke v. Thilmany*, 107 Wis. 216 (unguarded machine); *Swenson v. Osgood-Blodgett Mfg. Co.*, 91 Minn. 409 (unguarded machine); *Langlois v. Dunn Worsted Co.* [R. I.] 57 A. 910. *Ryan v. Long Island R. Co.*, 51 Hun, 607 (absence of warning at bridge. Court); *Shields v. Robins*, 3 App. Div. 582 (uncovered elevator. Court); *Klein v. Garvey*, 94 App. Div. 183, 87 N. Y. S. 998 (unguarded planer. "In view of this violation of the statute, it seems to us that it was a question for the jury to determine whether the plaintiff was shown to have such acquaintance with the dangers of the machine in this condition that he could be said to have assumed the risk"); *Sitts v. Waiontha Knitting Co., Ltd.*, 94 App. Div. 38, 87 N. Y. S. 911 (girl employed on unguarded mangle. Court); *McManus v. St. Regis Paper Co.*, 100 App. Div. 510, 91 N. Y. S. 1102 (unguarded machine. Jury); *Rooney v. Brogan Const. Co.*, 107 App. Div. 258, 95 N. Y. S. 1 (unguarded openings in floors. Jury); *Regling v. Lehmaier*, 98 N. Y. S. 642 (boy hurt on stamping machine. Jury); *Rahn v. Standard Optical Co.*, 110 App. Div. 501, 98 N. Y. S. 1060 (saw. Jury); *Kiernan v. Eidlitz*, 100 N. Y. S. 731 (unguarded

elevator shalt. Jury). See, also, New York cases, *infra*, nn. 235, 236. The construction to be given the Child Labor law, see § 51.

p. 601, n. 235. *Field v. New York Cent. & H. R. R. Co.*, 86 App. Div. 148, 83 N. Y. S. 535. ("It may be that in a flagrantly dangerous case public policy will not permit a railroad company to assert the doctrine of assumption of risks to relieve itself from liability for injuries to an employe growing out of its adoption of a bad rule or practice even though the workman was fully aware of it.") *Brown v. Siegel, Cooper & Co.*, 191 Ill. 226. ("Whether injuries which occur because of the violation by the master of municipal regulations enacted for the preservation of life or limb should be regarded as willful, and not subject to the defense of contributory negligence or to the defense of the implied assumption by the servant of the risks and dangers caused by such violation is a question of public policy for the legislature, and not one for the courts.") As to children illegally employed see, also, *supra*, § 51.

p. 602, n. 236. See cases *supra*, n. 232.

p. 603. See *Martin v. Chicago R. I. & P. R. Co.*, 118 Iowa, 148.

p. 604, n. 237. *Kansas City M. & B. R. Co. v. Flippo*, 138 Ala. 487 (Safety Appliance Act); *Mobile J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258 (Safety Appliance Act); *Taylor v. Boston & M. R. Co.*, 188 Mass. 390 (R. L. §§ 203, 209, Acts 1906, c. 463, II § 167); *Johnson v. Southern Pac. R. Co.*, 117 Fed. 462, 196 U. S. 1 (Safety Appliance Act); *Denver & R. G. R. Co. v. Arrighi* [C. C. A.] 129 Fed. 347 (Safety Appliance Act though
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relieving servant of assumption of risk does not relieve him of contributory negligence). See *Schlemmer v. Buffalo R. & P. R. Co.*, 27 Sup. Ct. 407 (where plaintiff coupling cars not equipped with safety device, in violation of U. S. statute, lifted his head too high after being warned and was hurt, it was held that this possibility is so clearly attached to the risk, which under the statute he did not assume, as to prevent the court ruling as a matter of law that he was guilty of contributory negligence). *Morisette v. Canadian P. R. Co.* [Vt.] 56 A. 1102 (Canadian statute); *Chicago, G. W. R. v. Crotty* [C. C. A.] 141 Fed. 913 (Iowa fellow-servant statute abolished defense of assumption of risk as to future negligence of fellow servants only); *Mott v. Southern R. Co.*, 131 N. Car. 234 (Priv. L. 1897, c. 56. Railroad statute); *Bodie v. Charleston & W. C. R. Co.*, 61 S. C. 468 (railroad statute). Recent legislation touching assumption of risk is found in Va. Laws 1902, c. 322, and Or. Laws 1903, p. 20 ("knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such (railroad) corporation shall not of itself be a bar to recovery for any injury or death caused thereby." The rule of contributory negligence still existing except so far as herein modified or changed). Ohio Laws 1904, p. 547 ("in any action brought by an employe, or his legal representative, against his employer, to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where said employe was employed, in the manner required by any penal

statute of the state or United States in force at the date of the passage of this act, the fact that such employe continued in said employment with knowledge of such omission shall not operate as a defense"). Wis. Laws 1905, c. 303 (where employer fails to guard premises or machinery as required by statute "the fact that such employe continued in said employment with knowledge of such omission, shall not operate as a defense"). Illinois Laws 1905, p. 350 (employe "shall not be deemed to have assumed the risks thereby occasioned, nor to have been guilty of contributory negligence, because of continuing in the employment of such common carrier or in the performance of his duties as such employe, after the unlawful use of such train, locomotive, tender, car, or similar vehicle had been brought to his knowledge"). Texas Gen. Laws 1905, c. 163 ("that in any suit against a person, corporation or receiver operating a railroad or street railway for damages . . . the plea of assumed risk of the deceased or injured employe where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases: First. Where such employe had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect. Second. Where a person of ordinary care would have continued in the service with

the knowledge of the defect and danger and in such case it shall not be necessary that the servant or employer give notice of the defect as provided in subdivision 1 hereof"). Indiana Laws 1903, c. 46, § 2; 1907, c. 131, § 2 (limiting hours of continuous employment of railroad employes and giving action to persons injured by violation "and no employe shall in any case be held to have assumed the risk incurred by reason of such violation or failure). Indiana Laws 1907, c. 118, § 14 (any employe killed or injured by violation of safety appliance provisions "shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such . . . had been brought to his knowledge, nor shall any such employe be held as having contributed to his injury in any case where the carrier shall have violated any of the provisions of this act when such violation contributed to the death or injury of any such employe"). Ala. Code 1907, *infra*.

Section 117. Effect of Employers' Liability Act.

p. 605, n. 239. *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250; *Sievers v. Eyre*, 122 Fed. 734 (New York Act); *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. S. 1090; *Berthelson v. Gabler*, 111 App. Div. 142, 97 N. Y. S. 421; *Redhead v. Dunbar & S. D. Co.*, 101 N. Y. S. 301; *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622. Since passage of St. § 359a, *Burns* 1901, plaintiff need not allege due care. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247; *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind. 569.

p. 606, n. 240. New York Laws 1902, c. 600, § 3. "An employe, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employe knew of the defect or negligence which caused the injury and failed, within a reasonable time, to give or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employe." See Appendix, p. 704. American Rolling M. Co. v. Hullinger, 161 Ind. 673; with the repeal of § 2, of act the common law became operative and the doctrine of assumption of risks became part of the section that created liability.

p. 610, n. 247. "The decisions in *Mobile R. Co. v. Holborn*, 84 Ala. 133, and *Highland Ave. Co. v. Walters*, 91 Ala. 435, though correct on the point to which we have cited them (voluntarily continuing to work in face of known risk), have been in effect overruled so far as they held that the employers' liability act operated as between employer and employe to abrogate the doctrine of *volenti non fit injuria*. That doctrine is founded on the consent, express, or implied, of the employe to take the chances of injury or escape from a threatening situation, but such consent is not implied unless the danger is obvious or is known to the employe." *Osborne v. Alabama S. & I. Co.*, 135 Ala. 571.

p. 611, n. 249. As to the provision in the New York statute, see *infra*, this section.

p. 613, n. 252. *Murphy v. Marston Coal Co.*, 183 Mass. 385 (improperly welded iron crank is a latent defect for which a servant is not required to search and of which he is not required, under R. L. c. 106, § 77, to give notice to the master). Icy walk, and defense contended that "under Rev. Laws c. 106, § 77, if the plaintiff knew of the defect and did not inform the defendant or some person intrusted by it with general superintendence he is barred from any remedy for the injury. This section does not require notice of latent defects of which by reason of their character the servant may be ignorant until thereby injured, nor is the requirement where the defect is known a precedent condition, compliance with which must be shown by the plaintiff, but is a matter of defense, with the burden of proof resting on the defendant. If the plaintiff admitted knowledge of snow and ice it still would be a question of fact whether he also should have known before the experience gained by his fall, and consequent injury, that the walk was thus made defective. Indeed, even if the defect of itself had not been transitory, but of a permanent character, which would exist where the structural condition of the ways, works, or machinery, or of their adjustment had become so impaired that further use might be attended with obvious danger, yet in all cases it would not follow that an employe must be presumed to know that the change constituted a defect within the meaning of the statute, although in some instances such knowledge might be imputed from the common experience of mankind." *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257.

p. 614, n. 253. *Cahaba Southern M. Co. v. Pratt*,
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40 So. 943. Servant is not obliged to report the defect to the "person intrusted" with duties as to the ways, works or machinery, but only to some person superior to himself in the service. See Ala. Code 1907, *infra*.

p. 614. Under the New York statute the servant must report the defect "unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employee." Thus, where it appeared that plaintiff had known of the defect for two weeks and did not report it, but there was evidence that defendant's superintendent had seen the defect before the accident, the plaintiff could recover. *Keating v. Coon*, 102 App. Div. 112, 92 N. Y. S. 474.

NEW YORK EMPLOYERS' LIABILITY ACT.

The New York statute contains the following provision, Laws 1902, c. 600, § 3: "An employe by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employes, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employes. In an action maintained for the recovery of damages for personal injuries to an employe received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employe continued in the service of the employer in the same place and course of employment after the discovery by such employe, or after he had been informed of the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employe to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employe understood and assumed the risk of such injury, or was guilty of contributory

negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence." Then follows the provision quoted supra, n. 240, which seems to have no bearing upon the construction of the above enactment. See Appendix, p. 704.

Does this provision apply to actions at common law?

In *Ward v. Manhattan R. Co.*, 95 App. Div. 437, 88 N. Y. S. 758, it was held that this section 3 was applicable to all actions by a servant against his master for negligence and not only applied to the causes of liability mentioned in the act but to the failure to make proper rules, for which the liability is solely at common law. It "prescribes a new rule, with reference to the assumption of the risks, more favorable to the employe than the rule that previously obtained." But see *Curran v. Manhattan R. Co.*, 103 N. Y. S. 351.

In *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. S. 148, the *Ward* case, above cited, was disapproved and it was held that in order to have the benefit of this section a servant must bring himself within the act by due service of notice. "It is true that section 3 has in it some general expressions, which might at first seem to make it applicable to all actions whether at common law or under this act. But no single section of an act can be separated from the rest and alone construed. This act must be read as a whole. In section 2 it is provided 'No action for recovery of compensation or death under this act shall be maintained unless notice of the time, place and cause of the injury is given to the employer. . . .' This provision of the statute does not require notice to be given in an action for injury or death under the first section of the act, but under the act itself, which includes all the sections; and the conclusion would seem to me irresistible that by force of this clause, one who would seek any of the benefits of this act must give the notice required by the act. Whether the recovery is sought for an increased liability under section 1 or section 3, the action is in either case brought under the act, and by the terms of section 2 quoted, the notice therein specified is required to be served." A dissenting opinion said that assumption of risk was an affirmative defense and section 3 does not operate on that: that the act has two purposes, one to *extend* and the other to *regulate*, and section 3 regulates and applies to all actions.

In *Overbaugh v. Wieber*, 106 App. Div. 283, 94 N. Y. S. 644, it was not necessary to decide the question.

In *Kinney v. Rutland R. Co.*, 99 N. Y. S. 800, the court directed a nonsuit and it was said that as a notice of injury had been served, the direction could stand only on ground that plaintiff had been guilty of contributory negligence.

It seems to the writer that this section applies to all actions for negligence brought by a servant against his master and that the service of notice is not a condition precedent to his availing himself of this provision. The terms of the provision themselves are general and the clause "In an action maintained for the recovery of damages for personal injuries to an employe received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact, etc." does not limit the section to a recovery under the other provisions of the act, or for a cause given only by this act, a phrase which could easily have been inserted had that been the intention. Moreover this section deals with the effect and weight to be given to evidence and thus it is clearly distinguishable from the first section of the act which defines new grounds of liability. The requirement of notice is important in cases based on the first section in order that the employer may be informed of the case he has to meet; it is not important for that purpose under section 3.

The Common-Law rule of Assumption of Risks has not been changed by this provision, but the weight and effect to be given to evidence upon that issue has been changed.

Wynkoop v. Ludlow Valve Mfg. Co., 98 N. Y. S. 1076. Unguarded tracks of traveling crane against which plaintiff stumbled. The trial judge charged, "The risks which the plaintiff assumed were those risks and those only inherent in the nature of the business of the defendant which remained after the defendant had exercised due care in providing for its employes, and had complied with the laws affecting or regulating the business for the greater safety of defendant's employes." Held error. The risks referred to are those described in the act as "necessary risks" and the statute declares that those are the only risks which the employe is "presumed to have assented to." Here there was an obvious danger which the court in effect told the jury could not be assumed. The question whether the plaintiff with full knowledge of the situation had assumed this risk was not submitted to the jury as it should have been.

Kiernan v. Eldlitz, 100 N. Y. S. 731. Elevator shaft unguarded in violation of statute. "Prior to the passage of the employers'

liability act it was the law of the state that a servant assumed the obvious risks of his employment, and if it clearly appeared that the injury was the result of such obvious risks as a matter of law he could not recover damages. . . . It is quite apparent, on careful reading of the act, that the doctrine of assumption of obvious risks has not been eliminated in an action by an employe against his employer, even if the negligence alleged be the failure to obey the strict provisions of the law as to furnishing of safeguards against injury by the employe. If that omission is obvious, the assumption of risk is not assumed as matter of law, entitling the employer to a direction by the court, but the question whether the employe understood and assumed the risk of such injury shall be one of fact, and, of course, if one of fact, to be submitted to the jury; in other words the doctrine of the assumption of obvious risks is still preserved, but the tribunal to pass upon the question is changed from the court to the jury. If the absence of the guard-rail was the cause of the accident, the physical fact of its absence was as obvious to the employe as to the master or his superintendent. But the statute says whether the employe understood and assumed the risk caused by the failure to erect the guard-rail must be submitted to the jury."

Carey v. Manhattan R. Co., 101 N. Y. S. 631. "It has always been the law that an employe assumes the obvious risks of his employment and the employers' liability act has modified the rule only in so far as to require a submission of the question to the jury as one of fact whether the employe understood and assumed the risk of injury."

Vaughn v. Glens Falls P. C. Co., 105 App. Div. 136, 93 N. Y. S. 979. It can no longer be presumed as a matter of law, that is, conclusively presumed, that an employe has assumed all risks that are obvious and fully appreciated by him. Such a presumption now goes only to those risks defined in the section as "necessary risks" so that continuance at work after discovery of a risk not included in the term "necessary risks" shall not "as a matter of law" be considered an assumption of that risk, but the question shall be one of fact for the jury.

Necessary risks.

The necessary or ordinary risks of the business which remain after the master has exercised due care are presumed to have been assented to by the employe, by his entrance upon or continuance in the service. The common-law rule as to such risks is therefore left

unchanged by the act, which has in substance adopted the common-law definition of such risks. See *supra*, §§ 90, 91, and cases above cited.

Risks known or obvious at the time of accepting employment.

The act provides that "an employe, by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment *and no others*. Later in the section it says "the fact that the employe continued in the service . . . shall not as a matter of law be considered as an assent." It is only in the first line of the section that anything is said about "entering upon" the employment, and it is only with reference to continuance at work, that anything is said about whether the servant understood and assumed the risk. Under this statute therefore is the same rule to be applied to the servant who knowing that he will work upon a defective machine and appreciating the danger therefrom, nevertheless enters upon the employment, and to the servant who after entering upon the employment finds that the machine upon which he works has become defective and appreciating the danger therefrom, nevertheless continues to work in the same place and course of employment? The distinction between these two cases has been pointed out in the preceding chapter and in §§ 102, 114. Under the New York Act it is clear that in the second example the question of the servant's assent to undertake the risk must be submitted to the jury (a result reached in England without the aid of legislation, § 114a). But except for the first clause of this section nothing is said about what inferences shall be drawn in the first example when the servant enters upon the employment.

On the words of the statute it is only with reference to a risk arising after the employment was entered into that the questions whether the servant "understood and assumed" the risk and by continuance at work assented to it are to be passed upon by the jury.

It is true that the statute says that a servant by entering upon the employment shall not be "presumed to have assented to" any but the necessary risks, but the use of the word "presumed" does not necessarily prevent the court from ruling upon evidence, and if the only evidence of assent is that knowing and appreciating the risk he accepted the employment, the only inference to be drawn therefrom is that he was willing to undertake the risk and as there are no conflicting facts or inferences to submit to a jury it would seem that the court should direct a verdict, and if, submitting the

case to the jury on that evidence, the jury found for the plaintiff, the verdict should be set aside.

It would seem therefore that this section has not actually changed the rule of law or the effect or weight of evidence in regard to the assumption of obvious or known risks by the acceptance of employment. The plaintiff's knowledge and appreciation and assent are still as they always have been questions of fact, to be passed on by the court when there are no conflicting facts or inferences or to be submitted to the jury when there is such conflict: and the cases upon such risks decided before the act are still authorities since its passage.

This point seems not to have been discussed in the decisions under this section. See *Kueckel v. O'Connor*, 73 App. Div. 594, 76 N. Y. S. 829; *Wynkoop v. Ludlow Valve Mfg. Co.*, 98 N. Y. S. 1076.

Risks arising subsequent to acceptance of employment.

Whether the plaintiff understood and assumed the risk of injury and whether by his continuance at work with knowledge of the risk he assented to it are questions of fact, and by virtue of this statute are to be passed upon by the jury subject to the usual powers of the court in a proper case to set aside a verdict contrary to the evidence. *Kueckel v. O'Connor*, 73 App. Div. 594, 76 N. Y. S. 829 (carpenter working at bottom of hoistway through which bundles of paper were raised); *Baker v. Empire Wire Co.*, 102 App. Div. 125, 92 N. Y. S. 355 (night foreman charged with duty of replacing cleats on gangway injured by defective cleats); *Vaughn v. Glens Falls P. C. Co.*, 105 App. Div. 136, 93 N. Y. S. 979 (plaintiff told to clear out cement chute that was clogged); *Di Stefano v. Peekskill L. R. Co.*, 107 App. Div. 293, 95 N. Y. S. 179 (explosion of dynamite in stone which was not an ordinary risk of employment); *Berthelson v. Gabler*, 111 App. Div. 142, 97 N. Y. S. 421 (superintendent ordered removal of pier causing scaffold to fall); *Cadigan v. Glens Falls G. & E. L. Co.*, 98 N. Y. S. 954 (altering gas main and escaping gas exploded); *Wynkoop v. Ludlow Valve Mfg. Co.*, 98 N. Y. S. 1076 (unguarded track of traveling crane); *Fremont v. Boston & M. R. Co.*, 98 N. Y. S. 179 (while coupling defective car others were shunted onto him); *Kinney v. Rutland R. Co.*, 99 N. Y. S. 800 (struck by old fashioned switch as he rode on side of freight car); *Kiernan v. Edlitz*, 100 N. Y. S. 731 (unguarded elevator shaft); *Roche v. India Rubber & G. P. I. Co.*, 100 N. Y. S. 1009 (rubber rolling machine could only be stopped by shutting off power); *Chisholm v. Manhattan R. Co.*, 101 N. Y. S. 622 (this section applies only to continuance at work

with knowledge); *Carey v. Manhattan R. Co.*, 101 N. Y. S. 631 (short circuit on third rail system).

Assumption of Risks caused by Violation of Statutory Provisions.

The statute excepts, as does the common law, from the class of "necessay risks" those occasioned by the violation by the master of a statute passed for the benefit of the employe; it does not, however provide, as do the statutes referred to in § 116, n. 237, *supra*, that risks so caused shall not be assumed. It would seem therefore that no distinction is made between risks caused by the violation of a statute and risks caused by the violation by the master of a common-law duty owed his employe and if as a matter of fact it shall be found that a risk arising from either violation was known, appreciated and assented to by the servant, he cannot recover.

Function of court under this section.

Where the proof is all one way it is proper to direct a verdict and this is so notwithstanding the fact that where there is any dispute in the evidence, or room for conflicting inferences to be drawn from the undisputed evidence the burden of proof as to the assumption of risk is upon the defendant. *Kueckel v. O'Connor*, 73 App. Div. 594, 76 N. Y. S. 829 (plaintiff working at bottom of hoistway. Court).

"The power of the court 'to set aside a verdict rendered contrary to the evidence' implies a disputed question of fact, and does not meet the case where there is no evidence exculpating the employe from blame" This was a case of contributory negligence rather than assumption of risk. *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. S. 1090 (caught on pulley wheel).

"The act does provide for the submission to the jury in an action for personal injuries of the question of assumption of risk. It further provides, however, that the verdict of the jury upon such a question shall, as in other cases, be subject to review upon the facts, and that it may be set aside as against the weight of evidence . . . and giving to the statute invoked by the plaintiff the full scope and meaning claimed by her, it was against the weight of evidence for the jury to render a verdict in her favor upon this point." Plaintiff charged with duty of replacing cleats in gangway was injured by a defective one. *Baker v. Empire Wire Co.*, 102 App. Div. 125, 92 N. Y. S. 355; *Vaughn v. Glens Falls P. C. Co.*, 105 App. Div. 136, 93 N. Y. S. 979 (plaintiff hurt in cleaning cement chute which had become clogged. Verdict for him vacated); *Kiernan v. Eldlitz*, 100 N. Y. S. 731 (unguarded elevator in violation of stat-

ute. Jury); *Roche v. India Rubber & G. P. I. Co.*, 100 N. Y. S. 1009 (plaintiff hurt on rubber rolling machine which he knew could be stopped only by shutting off the power. Nothing in § 3 to prevent a reversal of judgment for him); *Reilly v. Troy Brick Co.*, 184 N. Y. 399 (falling of clay bank. Jury); *Aken v. Barnet & A. K. Co.*, 118 App. Div. 463 (remaining on defective elevator. Jury).

Section 118. Court or Jury.*

p. 621, n. 273. Fact that judge saw how stupid the witness appeared does not prevent appellate court from holding that he appreciated the risk. *Chmiel v. Thorndike Co.*, 182 Mass. 112. See, also, *supra*, § 98, n. 234.

p. 625, n. 285. "An assumption by the servant of a risk which it is the master's duty to remove can rarely be found as a question of law. All risks whether plain or obscure and uncertain, which are incident to the work, and cannot be avoided by the master in the fulfillment of his duty to provide his servant with safe appliances and a safe place to work, are assumed by the servant as matter of law, unless the master assume them by agreement. . . . But the risks which can be avoided by the master by fulfilling his said duty, are not assumed by the servant unless they be so plain and certain to him that it has to be said as matter of law that his working in the face of them was an assumption of them. If they be not so plain and certain as that, then the question becomes one of fact instead of law, with the burden of proof on the master." *Lynch v. American Linseed Co.*, 99 N. Y. S. 260. See *New York Employers' Liability Act*, *supra*, § 117.

* 6 Curr. Law, 600.

p. 626, n. 290. Presumption that plaintiff exercised due care does not obtain where there is direct evidence as to circumstances of accident. *Ames v. Waterloo & C. F. R. T. Co.* [Iowa] 95 N. W. 161. Where there is no evidence one way or the other it may be presumed that the plaintiff exercised due care: but from this presumption it does not follow that defendant was negligent, for he will also be presumed to have performed his duty. *Looney v. Metropolitan R. Co.*, 200 U. S. 480.

p. 627, n. 292. If contributory negligence appears from the plaintiff's testimony it is as effective as if proved by the defendant who has the burden under *Burns* 1901, § 359a. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274.

p. 627, n. 293. "Slight positive evidence, whether circumstantial or otherwise, when taken in connection with the instincts of self preservation, and the desire to avoid pain or injuries to one's self, may be sufficient to support a conclusion that one who suffers injury did not help to bring it on himself." *Brakeman struck by trees hanging over track. Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189; *Donaldson v. New York, N. H. & H. R. Co.*, 188 Mass. 484 (brakeman seen standing in usual place as train drew into station and then found dead. Court); *Scheir v. Quirin*, 77 App. Div. 624, 78 N. Y. S. 956; *Id.*, 177 N. Y. 568 (plaintiff's intestate scalded by falling into vat. Though where there are no eye witnesses there is a relaxation in the proof yet burden of proving due care remains on plaintiff. Court); *Goodhines v. Chase*, 100 App. Div. 87, 91 N. Y. S. 313; *Id.*, 185 N. Y. 552 (ex-
(371)

plosion of blow off appliance on boiler which was in intestate's charge. Freedom from contributory negligence may be established from circumstances where there are no eye witnesses, but nothing appears here. Court); *Di Pietro v. Empire Portland C. Co.*, 70 App. Div. 501, 75 N. Y. S. 275 (intestate on scaffold caught in cog wheels. Court); *Huff v. American F. E. Co.*, 88 App. Div. 324, 84 N. Y. S. 651 (caught in shaft. Court); *Lowry v. Anderson Co.*, 96 App. Div. 465, 89 N. Y. S. 107 (boy found dead at bottom of freight elevator. "Usually what is contributory negligence is for the jury to determine, and the immaturity of Lowry, and the fact that he lost his life in the catastrophe and that no eye witnesses were present, are circumstances mitigating the proof required. The necessity of its production, however, still exists, and the plaintiff must present some evidence—some circumstances—warranting the conclusion that the deceased exercised care commensurate with the situation." Court); *Scialo v. Steffens*, 105 App. Div. 592, 94 N. Y. S. 305 (caught in belt. Court); *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. S. 1090 (caught in pulley wheel. Court).

p. 627, n. 294. *Irish v. Union B. P. Co.*, 103 App. Div. 45, 92 N. Y. S. 695 (came in contact during his work with defectively insulated wires. Jury. Reviews railroad cases, which, if not making an exception to rule that plaintiff must prove due care, yet authorize a jury to infer absence of negligence where injury happens from obstructions and the like. This is a case of like character); *Hoes v. Ocean S. S. Co.*, 56 App. Div. 259; *Id.*, 170 N. Y. 581 (valve exploded.

Plaintiff was in the ordinary performance of his duties and had no reason to anticipate the occurrence of such an accident. Due care may be inferred).

Section 119. Judicial Notice.

p. 630, n. 300. Choctaw, O. & G. R. Co. v. Holloway [C. C. A.] 114 Fed. 458 (that engines have brakes); Northern Ala. R. Co. v. Shea, 142 Ala. 119 (that rotten ties will not hold railroad spikes); Cincinnati, H. & D. R. Co. v. Thiebaud [C. C. A.] 114 Fed. 918 (that engineer acts under orders of a superior); Allen v. Florence & C. C. R. Co., 15 Colo. App. 213 (that trains make noises incident to their operation); Alabama, G. S. R. Co. v. Brooks, 135 Ala. 401 (that cars move slowly in making coupling); Pittsburgh, C. C. & St. L. R. Co. v. Nicholas, 165 Ind. 679 (that sudden stopping of train causes jerk); Southern R. Co. v. Crowder, 135 Ala. 417 (that freight trains jolt and jar more than passenger trains); Foley v. Boston & M. R. Co. [Mass.] 79 N. E. 765 (that cars jolt); Hannigan v. Lehigh & H. R. R. Co., 157 N. Y. 244 (that drawheads come in contact when cars are coupled).

p. 631, n. 301. Tutwiler, C. C. & I. Co. v. Farrington, 39 So. 898 (will not notice usage of miners to prop their own roofs).

p. 631, n. 303. Re Michigan S. S. Co., 133 Fed. 577 (that petroleum is inflammable).

Other matters of common knowledge. Corning Steel Co. v. Pohlplatz, 29 Ind. App. 250 (that pot of molten metal is hot); Elser v. Village of Gross Point [Ill.] 79 N. E. 27 (that at certain seasons in certain localities there is a heavy rainfall and liability of fresh-

ets); Lennan v. Goodrich [Mass.] 78 N. E. 421 (that bicycle chain might catch on shafting); Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7 (that in the operation of machinery some part may break: bolt); Meehan v. Holyoke St. R. Co., 186 Mass. 511 (process of stringing wires); Duffy v. New York, N. H. & H. R. Co. [Mass.] 77 N. E. 1031 (that wheels weighing 7,000 lbs. on track if started would start slowly and could not be stopped quickly when in motion); Manning v. Excelsior Laundry Co., 189 Mass. 231 (that hand would be burned on hot cylinder of mangle); Wolfe v. New Bedford C. Co., 189 Mass. 591 (difference between iron and steel when both highly polished); Dimmick Pipe Wks. v. Wood, 139 Ala. 282 (that working with loaded wheelbarrow requires more strength than hand shovel); Hughes v. Schnavel, 20 Colo. App. 306 (that scaffold may become weakened by use); Murphy v. Marston Coal Co., 183 Mass. 385 (not common knowledge whether iron crank is properly welded).

p. 633, n. 310. Plaintiff, court and jury all have common knowledge. Roytio v. Litchfield [C. C. A.] 113 Fed. 240. No expert evidence necessary as to process of stringing wires for this is a matter of common knowledge. Meehan v. Holyoke St. R. Co., 186 Mass. 511. Testimony as to what would have happened if driver of wagon had made a sharp turn to right to escape plaintiff's buggy, not admissible since it is a matter of common knowledge. W. J. Lemp. Brewing Co. v. Ort [C. C. A.] 113 Fed. 482.

CHAPTER X.

PLEADING AND PRACTICE.

- § 120. Material Allegations of Declaration.**
 - 121. Defect in Condition.**
 - 122. Negligence of Superintendent.**
 - 123. Negligence of person to Whose Orders Plaintiff Must Conform.**
 - 124. Negligence of Person in Charge or Control.**
 - 125. Notice.**
 - 126. Pleading Negligence.**
 - 127. Contributory Negligence.**
 - 128. Joinder of Counts.**
 - 129. Election of Counts.**
 - 130. Pleading by the Defendant.**
 - 131. Directing Verdict.**
 - 132. Fact of Insurance not Admissible.**

Section 120. Material Allegations of Declaration.*

p. 634, n. 1. Where the pleader elects to specify the particulars in which defendant was negligent, he must be confined to proof of those particulars. *Murphy v. Milliken*, 84 App. Div. 582, 82 N. Y. S. 951. General rules of pleading apply save where changed by the statute. *American Rolling M. Co. v. Hullinger*, 161 Ind. 673. In Indiana complaint must show that defendant is a corporation. *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178. But as to an action arising out of negligence in relation to a railroad, see *supra*, § 10, n. 117.

* 6 Curr. Law, 591.

Section 121. Defect in Condition.*

p. 637, n. 8. Sloss-Sheffield S. & I. Co. v. Hutchinson, 40 So. 114 (alleging that engine is defective without pointing out what part of it is defective is sufficiently particular); Louisville & N. R. Co. v. Jones, 130 Ala. 456 (pleading should indicate what defect was); Birmingham Rolling M. Co. v. Rockhold, 143 Ala. 115 (proper pleading of defect). See, also, Illinois Car & E. Co. v. Walch, 132 Ala. 490; Southern C. & F. Co. v. Jennings, 137 Ala. 247; Jackson Lumber Co. v. Cunningham, 141 Ala. 206 (following statute proper); Hay v. Bash [Ind. App.] 76 N. E. 644 (improper pleading). See Southern R. Co. v. Sittasen [Ind.] 74 N. E. 898, 76 N. E. 973 (where it did not appear that accident happened because of defect).

p. 637, n. 9. Walton v. Lindsay Lumber Co., 39 So. 670.

p. 638, n. 14. Houston Biscuit Co. v. Dial, 135 Ala. 168; Northern Ala. R. Co. v. Shea, 142 Ala. 119.

Section 122. Negligence of Superintendent.**

p. 638, n. 19. Southern C. & F. Co. v. Bartlett, 137 Ala. 234 (count should allege that person was entrusted with superintendence and negligent in exercise of superintendence). Proper pleading. Louisville & N. R. Co. v. Jones, 130 Ala. 456; Illinois Car & E. Co. v. Walch, 132 Ala. 490; Creola Lumber Co. v. Mills, 42 So. 1019. Bad pleading. Bear Creek M. Co. v. Parker, 134 Ala. 293. In New York it is proper to plead the negligence as that of the defendant, under which

* 6 Curr. Law, 587.

** 6 Curr. Law, 590.

evidence of superintendent's negligence may be offered, rather than to allege the negligence as that of the superintendent. *Harris v. Baltimore M. & El. Wks.*, 98 N. Y. S. 440, 112 App. Div. 903; *Id.*, 188 N. Y. 141.

Section 123. Negligence of Person to Whose Orders Plaintiff Must Conform.*

p. 639, n. 21. Must show that it was plaintiff's duty to conform to the order. *Indianapolis & G. R. Trans. Co. v. Foreman*, 162 Ind. 185; *Southern Ind. R. Co. v. Martin*, 160 Ind. 280. Must show that order was given and conformed to and that it was negligently given. *Creola Lumber Co. v. Mills*, 42 So. 1019. Must allege that order was negligent. *Chicago & E. I. R. Co. v. Lain* [Ind. App.] 79 N. E. 547; *Ft. Wayne, I. & S. Co. v. Parsell* [Ind.] 79 N. E. 439; *Alabama S. & W. Co. v. Clements*, 40 So. 971. See generally *Acme Bedford Stone Co. v. McPhetridge*, 35 Ind. App. 79; *Pittsburgh, C. C. & St. L. Co. v. Nicholas*, 165 Ind. 679; *Illinois Car & E. Co. v. Walch*, 132 Ala. 490; *Bear Creek M. Co. v. Parker*, 134 Ala. 293.

p. 639, n. 22. Must allege name of person giving the particular instructions. *Herren v. Tuscaloosa W. Wks. Co.*, 40 So. 55. But need not allege the name of the person who acted in obedience to the particular instructions. *Reiter-Conley Mfg. Co. v. Hamlin*, 40 So. 280.

p. 639, n. 24. *Alabama S. & W. Co. v. Clements*, 40 So. 971.

* 6 Curr. Law, 590.

Section 124. Negligence of Person in Charge or Control.*

p. 639, n. 25. Northern Ala. R. Co. v. Shea, 142 Ala. 119 (when last name of person is alleged and it is stated that his Christian name is unknown complaint need not allege due diligence in trying to discover it).

p. 640, n. 28. Complaint good though it alleges by recital rather than by averment that engineer was in charge. Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248. See Tennessee C. I. & R. Co. v. Bridges, 39 So. 902. Should aver that persons operating engine were in master's service. Cleveland, C. C. & St. L. R. Co. v. Peirce, 34 Ind. App. 188; Southern Ind. R. Co. v. Baker [Ind. App.] 77 N. E. 64. See generally Chicago I. & L. Ry. Co. v. Williams [Ind.] 79 N. E. 442; Pittsburgh, C. C. & St. L. R. Co. v. Peck, 165 Ind. 537; Bear Creek M. Co. v. Parker, 134 Ala. 293; Alabama G. S. R. Co. v. Williams, 140 Ala. 230; Creola Lumber Co. v. Mills, 42 So. 1019.

p. 640, n. 30. Sloss-Sheffield S. & I. Co. v. Mobley, 139 Ala. 425; Tennessee C. I. & R. Co. v. Bridges, 39 So. 902. Complaint should show that plaintiff was employed on or about a railroad. Alabama, S. & W. Co. v. Griffin, 42 So. 1034.

Section 125. Notice.**

p. 640, n. 32. Crosby v. Lehigh Valley R. Co., 128 Fed. 193.

* 6 Curr. Law, 587.

** 6 Curr. Law, 590.

Section 126. Pleading Negligence.*

p. 641, n. 36. *Kansas City M. & B. R. Co. v. Flippo*, 138 Ala. 487.

Mere allegation of legal duty without allegation of facts sufficient to create it will be stricken out on motion. *Green v. Indiana Gold M. Co.*, 120 Fed. 715. Must aver knowledge by master of defect. *Malott v. Sample*, 164 Ind. 645; *Kentucky & I. B. & R. Co. v. Moran* [Ind. App.] 79 N. E. 213 (need not allege that master had knowledge long enough before to make repairs); *Consolidated Stone Co. v. Morgan*, 160 Ind. 241 (if defendant constructed derrick no further allegation of knowledge is necessary). Defendant argued that declaration did not allege negligence, and asked to have verdict directed on that ground but as there was no demurrer and case was tried on its merits as an action of negligence the request was properly refused. *Savage v. Marlborough St. R. Co.*, 186 Mass. 203. If two acts of negligence are averred and the only injury complained of resulted from these two acts acting conjointly, there can be no recovery if one is found not to exist. But otherwise if any one of the acts is sufficient to cause the injury. *Gould Steel Co. v. Richards*, 30 Ind. App. 348.

p. 642, n. 37. There may be a recovery for willful or intentional wrong under the act. *Louisville & N. R. Co. v. York*, 128 Ala. 305; *Southern R. Co. v. Moore*, 128 Ala. 434. Definition of willful or wanton injury. *Alabama G. S. R. Co. v. Williams*, 140 Ala. 230. Plead-

* 6 Curr. Law, 587.

ing of wanton injury. *Southern R. Co. v. Bunt*, 131 Ala. 591; *Perkins v. Birmingham, S. R. Co.*, 132 Ala. 469; *Louisville & N. R. Co. v. Banks*, 132 Ala. 471. Wanton or reckless negligence of servant does not render master liable unless he would have been liable otherwise. *Tennessee C. I. & R. Co. v. Bridges*, 39 So. 902.

p. 642, n. 38. See *Rev. Laws Mass.*, c. 173, § 68. *Tipton Light H. & P. Co. v. Newcomer*, 156 Ind. 348; *Eaton v. Fitchburg R. Co.*, 129 Mass. 364; *Union Traction Co. v. Buckland*, 34 Ind. App. 420. See *Wyman v. Clark*, 180 Mass. 173 (as to variance).

Section 127. Contributory Negligence.*

p. 643, n. 39. *Redhead v. Dunbar & S. D. Co.*, 101 N. Y. S. 301.

p. 643, n. 40. *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414. Since statute, plaintiff need not allege due care, and issue must be raised by defendant under general denial and he has the burden of proof. *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690 (applies to cause of action existing when statute passed when suit was not begun till afterward); *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247 (under act); *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind. 569 (under act); *New Castle Bridge Co. v. Doty* [Ind. App.] 76 N. E. 557; *Roberts v. Terre Haute Elec. Co.* [Ind. App.] 76 N. E. 895.

p. 644, n. 43. *Foley v. Pioneer M. Mfg. Co.*, 40 So. 273, must be specially pleaded. *Creola Lumber Co. v.*

* 6 Curr. Law, 590.

Mills, 42 So. 1019, plea should not aver contributory negligence as a conclusion but should set out facts.

Section 128. Joinder of Counts.

p. 646, n. 54. *Sloss I. & S. Co. v. Tilson*, 141 Ala. 152; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337; 109 App. Div. 914, 95 N. Y. S. 1139; *Id.*, 81 N. E. 765.

p. 646, n. 55. Where a count was brought by administrator at common law for suffering and another count to recover for death under R. L. c. 171, § 2, it was held that they could not be joined since the plaintiff did not sue in the same capacity, for in the first count he sued as representative of the estate for which he would hold proceeds and in the other as representative of the next of kin for whom under the statute he is trustee. *Brennan v. Standard Oil Co.*, 187 Mass. 376; *Manning v. Conway* [Mass.] 78 N. E. 401. As to joinder of such counts under Employers' Liability Act, see Mass. Acts 1906, c. 370. *Supra*, § 18, n. 53.

Section 129. Election of Counts.

p. 647, n. 57. Plaintiff held to practice of submitting case to jury on employers' liability act counts without disposing of other counts. *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397. Where plaintiff an administrator improperly joined common-law count with count for death under Rev. Laws, c. 171, § 2. *Brennan v. Standard Oil Co.*, 187 Mass. 376 (judge refused to make plaintiff elect); *Manning v. Conway* [Mass.] 78 N. E. 401 (amendment by striking out one

count allowed to plaintiff after verdict). See *supra*, § 18, n. 53. A count alleging negligence of defendant in failing to furnish a safe place and a count alleging negligence of fellow-servant under Sess. Laws 1901, c. 67 (see Appendix), are not inconsistent and plaintiff cannot be required to elect. *Vindicator Consol. G. M. Co. v. Firstbrook* [Colo.] 86 P. 313. Plaintiff setting up counts at common law and under the act cannot be compelled to elect before trial. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. S. 657; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. S. 337; 109 App. Div. 914, 95 N. Y. S. 1139; *Id.*, 81 N. E. 765. Plaintiff required to elect after evidence all in. *Harris v. Baltimore M. & E. Wks.*, 112 App. Div. 903, 98 N. Y. S. 440; *Id.*, 188 N. Y. 141.

p. 647, n. 58. *Bowes v. New York, N. H. & H. R. Co.*, 181 Mass. 89 (plaintiff in fact elected).

Section 130. Pleading by the Defendant.*

p. 648, n. 60. That declaration does not allege negligence. *Savage v. Marlborough St. R. Co.*, 186 Mass. 203.

Section 131. Directing Verdict.**

p. 650, n. 68. Even if there is danger that the jury will give an unjust verdict upon evidence which ought to be submitted to it, the proper course is nevertheless to leave the case to the jury and if such a verdict is given to set it aside as against the evidence or the weight of the evidence, and not in the first instance to

* 6 Curr. Law, 590.

** 6 Curr. Law, 600.

order a verdict. *Aiken v. Holyoke St. R. Co.*, 180 Mass. 8.

p. 651, n. 69. Federal courts follow the practice of the state courts with reference to nonsuit or direction of verdict. *Parks v. Southern R. Co.* [C. C. A.] 143 Fed. 276. Dismissal on plaintiff's opening cannot be sustained where the complaint sets out a good cause of action and the opening is not made part of the record. *Murphy v. Hopper*, 75 App. Div. 606, 78 N. Y. S. 657.

p. 651, n. 70. Must rest upon making request for nonsuit else it will be treated as waived. *Northwestern S. S. Co. v. Griggs* [C. C. A.] 146 Fed. 472.

p. 651, n. 72. Request to direct a verdict made by party having burden of proof should not be granted where the verdict must be based wholly or partially on the testimony of witnesses. *Stephens v. American C. & F. Co.* [Ind. App.] 78 N. E. 335.

Section 132. Fact of Insurance Not Admissible.

p. 653, n. 76. Improper to state that defendant is insured. *Coe v. Van Why*, 33 Colo. 315. Asking jury if they were acquainted with or employed by insurance company is improper. *Tanner v. Harper*, 32 Colo. 156.

Asking jury if they were interested in company in which defendant was insured held proper. See, also, as to examination of insurance agent who procured release. *Vindicator Consol. G. M. Co. v. Firstbrook* [Colo.] 86 P. 313. Plaintiff's counsel's remark "There is no evidence that (defendant) was insured, most of these people are" held improper and prejudicial error. *Loughlin v. Brassil* [N. Y.] 79 N. E. 854.

APPENDIX.

APPENDIX.

A.

p. 659, § 3. "Earnings" means money or things capable of being turned into money by accurate estimation such as rent, clothes, food, etc. It does not include the tuition which an apprentice receives from his master. *Noel v. Redruth Co.* ['96] 1 Q. B. 453.

B.

ALABAMA EMPLOYERS' LIABILITY ACT.

p. 663. (Civ. Code Ala. 1907, c. 80, §§ 3910-3913.)

Employer and Employee.

- § 3910. Liability of master or employer to servant or employe for injuries.
- 3911. Damages exempt.
- 3912. Personal representative may sue, if injury results in death.
- 3913. Insurance benefit no bar to recovery.

p. 663. 3910 (1749) (2590). **Liability of master or employer to servant or employe for injuries.**—When a personal injury is received by a servant or employe in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, electric motor,¹ switch car, or train upon a railway, or of any part of the track of a railway.

The master or employer is not liable under this section,² if the servant or employe knew of the defect or

¹ The words "electric motor" added by the revision of 1907.

² The former Code began this clause with the word "but."

negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless³ the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition; provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of.⁴

3911 (1750) (2592). Damages exempt.—Damages recovered by the servant or employe of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

³In the revision of 1907 the words "he was aware that" (see Code of 1896) have been omitted, thus the holding in the case cited *supra*, § 117, n. 254, is no longer law.

⁴This is a new clause added in the revision of 1907. See *supra* § 116, n. 237, *Infra*, Federal Safety Appliance Act at page 410. This proviso means that remaining at work with knowledge shall no longer of itself show conclusively a consent to incur the risk but that there must be other facts, bearing upon this issue of consent, to permit the defence of contributory negligence or assumption of risk to be raised. See *supra*, § 114.

3912 (1751) (2591). Personal representative may sue, if injury results in death.—If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.

3913.⁵ Insurance benefit no bar to recovery.—No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe; but upon the trial of such action against any employer, the defendant may set off therein any sum he (or it) has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of death, to his personal representative.

C.

p. 668. Acts Mass. 1906, c. 370. An Act Relative to the Recovery of Damages in Cases of Death Caused by Accidents to Employes.

Be it enacted, etc., as follows:

Section 1. Section seventy-two of chapter one hundred and six of the Revised Laws is hereby amended

⁵ This section is added by the revision of 1907. It is intended apparently to do away with the defense which was successful in the

by adding at the end thereof the words:—and in the same action under a separate count at common law, may recover damages for conscious suffering from the same injury,—so as to read as follows:—Section 72. If the injury described in the preceding section results in the death of the employe, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employe may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury; and in the same action under a separate count at common law, may recover damages for conscious suffering resulting from the same injury.

Section 2. This act shall take effect upon its passage. [Approved May 8, 1906.]

See *supra*, § 18.

E.

p. 679. By this statute of 1901, c. 67, the conditions, limitations and procedure of the Employers' Liability Act 1893, c. 77, are not repealed: therefore, when one is injured by a fellow-servant's negligence and brings his action under the 1901 statute he must nevertheless serve notice of injury in accordance with the statute

case of *Harrison v. Alabama-Midland R. Co.*, 144 Ala. 246. See *supra*, § 26. The same provision is found in the Federal Employers' Liability Act, § 3.

of 1893. *Lange v. Union Pac. R. Co.* [C. C. A.] 126 Fed. 338. The statute of 1901 is constitutional. "That the act in question may be regarded by some as harsh or unjust, because imposing too great a liability, is not a matter which we can consider in determining its validity by constitutional tests. Whether or not the employer is liable under the act in question must be determined by each particular case based on the provisions of that act. It does not deprive him of any defense to the liability thereby imposed which, under the established rules of law, could be regarded as sufficient, save and except his own lack of negligence: but such a defense is not a constitutional right. . . . For the purpose of providing for the safety and protection of employes in the service of a common employer, the law-making power has the undoubted authority to abrogate the exception to the general rule of respondeat superior in favor of the employer, and make him liable to one of his employes for damages caused by the negligence of another employe while acting within the scope of his employment, regardless of the fact that such employes are fellow-servants." *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 86 P. 313.

F.

p. 680. The Workmen's Compensation Acts of 1897 and 1900 have been repealed by a new Workmen's Compensation Act of 1906, 6 Edw. VII, c. 58, which took effect on July 1st, 1907.

G.

p. 702. The figure "3" should be stricken out of the statute as here printed.

p. 705, n. 1. Cases upon the construction of this section will be found in § 117, *supra*.

p. 708. **New York Laws 1906, c. 657. An Act to Amend the Railroad Law in Relation to Liability for Injuries to Employees.**

Section 1. Chapter five hundred and sixty five of the laws of eighteen hundred and ninety, entitled "An act in relation to railroads, constituting chapter thirty nine of the general laws, and known as the railroad law," is hereby amended by adding thereto a new section, to be known as section 42a, as follows:

§ 42a. In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to or death resulting from personal injury of any person while in the employment of such corporation or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employes, every employe, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employes, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver

thereof, who are entrusted by such corporation or receiver with the authority of superintendence, control, or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employe in the performance of the duty of such employe,¹ or who have as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train, or telegraph office,² are vice-principals of such corporation or receiver and are not fellow-servants of such injured or deceased employe. If an employe, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools, or implements, or of any car, train, locomotive or attachment thereto belonging, owned, or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such corporation or receiver by reasonable and proper care, tests, or inspection, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is sustained;³ and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employe or his legal representatives against any such railroad corporation or receiver, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation or

¹ See *supra*, Chapters V, VI.

² See *supra*, Chapter VII.

³ See *supra*, Chapter IV.

receiver.⁴ This section shall not affect actions or causes of action now existing; and no contract, receipt, rule, or regulation, between an employe and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.⁵

§ 2. This act shall take effect immediately.

Became a law May 29, 1906.

H.

PENNSYLVANIA.

An Act extending and defining the liability of employers in actions for negligence for injury or death of their employes, declaring what shall not be a defence in such actions by employes against their employers, and defining who are agents of the employer under this act.

Section 1. Be it enacted, etc., that in all actions brought to recover from an employer for injury suffered by his employe the negligence of a fellow servant of the employe shall not be a defense where the injury was caused or contributed to by any of the following causes, namely:¹

⁴ See *supra*, § 50.

⁵ See *supra*, § 25.

¹ This act removes the fellow-servant defense in certain cases. It does not pretend to enlarge or change the duties of the master as they exist at common law. The servants for whose negligence the

Any defect in the works, plant or machinery of which the employer could have had knowledge by the exercise of ordinary care,² the neglect of any person engaged as superintendent, manager, foreman³ or any other person in charge or control⁴ of the works, plant

master is made answerable by this statute seem to be those who are entrusted with slight or large authority over other employes, whether this authority is over many or few servants and whether it is temporary or permanent, and also those who are entrusted with the supervision and maintenance of the works, plant or machinery. It does not seem to cover the negligence of mere laborers operating machines or those who are given no authority.

² This clause seems not to affect the master's duties as to his works, plant or machinery but to provide that if he might have had knowledge of the defect by the exercise of ordinary care, he can not set up the defense of negligence of a fellow servant causing or contributing with this defect to an accident. This provision covers the negligence of any fellow-servant whether entrusted with any of the master's duties or not. The negligence of a fellow-servant which is not a proximate or contributing cause of the accident (*supra*, §§ 14, 15) is not covered by this clause and the common-law rule that the defense of fellow-service cannot be set up by the master when the negligence of a servant concurs with his own to produce the injury seems not to be affected (*supra*, § 15). When a defect is a condition rather than an active contributing cause of an injury, it would seem that the statute permits the defense of fellow-service to be urged. There must be a defect, known to the master in the exercise of ordinary care, which works with the negligence of a servant toward the injury: a defect which under the rules of proximate cause has nothing to do with the injury does not permit a plaintiff to recover for the negligence of a fellow-servant.

³ See *supra*, § 55.

⁴ As to the construction given the words "charge or control" in the Employers' Liability Act, see *supra*, § 74. It would seem unlikely that the court would follow the construction given these words in the Employers' Liability Act since this statute is not modelled on that act and is not therefore an adoption of its phrase-

or machinery,⁵ the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death,⁶ the negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto, the injury or death resulted,⁷ the act of any fellow-servant done in obedience to the rules, instructions or orders given by

ology and meaning. The context of the statute seems to make these words refer to a person entrusted with direction or supervision over men or machinery rather than to a person who merely has the physical manipulation or operation of the works, plant or machinery; to a boss, in other words, as distinguished from a mere laborer. If the contrary construction were to be adopted, a mere laborer might by his negligence charge the master with responsibility, and if that were the intention of the Legislature the whole fellow-servant defense might have been swept away in fewer words, and without attempting to specify the persons who are no longer to be regarded as fellow-servants. See *infra*, § 2 of the statute.

⁵ As to these words in the Employers' Liability Act, see, *supra*, §§ 46, 47, 48.

⁶ This provision seems to cover the negligence of any boss or foreman however low his rank or temporary his authority as such who in relation to the particular work of the injured employe exercised some duty of direction. Thus it is possible that the operator of a machine, a mere laborer, who has a "helper" and gives him directions about the ordinary running of the machine, may by his negligence charge the master with responsibility. This seems a radical provision. It would probably be held that the negligence must be negligent direction rather than negligence during the period when direction was exercised. See *supra*, §§ 62, 67.

⁷ *Supra*, Chapter VI. This seems to be an adoption of the phraseology of the Employers' Liability Acts, but omitting the words "at the time of the injury" which in these Acts follow the clause "to whose orders the employe." Probably the omission would not change the construction to be given the clause. As to negligence of a person described herein, see *supra*, § 67.

the employer or any other person who has authority to direct the doing of said act.*

Section 2. The manager, superintendent, foreman or other person in charge or control of the works or any part of the works* shall under this act be held as the agent of the employer in all suits for damages for death or injury suffered by employes.

Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

Approved June 10th, 1907.

I.

UNITED STATES.

The Employers' Liability Act.¹

An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employes.

* This clause seems to be in substance an adoption of the clause of the Employers' Liability Act. See *supra*, §§ 69-72.

* See *supra*, note 4. The phraseology here does not cover all the persons for whose negligence the master is made liable in Section 1 of the statute.

¹ In *Brooks v. Southern Pac. Co.* [Ky.] 148 Fed. 986, Evans J., held on demurrer that the act was unconstitutional. See *post*, n. 16.

"If the act be valid as a regulation of commerce . . . It is the supreme law of the land of general application, and as such is binding upon all courts—state and federal—and fixes imperative rules by which all of them must hereafter be governed.

"The act is not limited, and manifestly was not intended to be

limited to the purpose of changing certain rules of law administered in the federal tribunals in suits for damages pending therein, but was designed to operate as a regulation of commerce.

"Creating new liabilities growing out of the relations of master and servant on the one hand, and regulating commerce on the other, are two things so entirely different that confusion of the judicial mind upon them is hardly to be expected under normal conditions. In the opinion of the court the act does not regulate commerce between the states. While Congress seems to have desired in this instance to exert the power given by the Constitution for that purpose, it, in fact, regulated something which is not commerce at all.

"Argument was made attempting to show that the language should be construed to create a liability only when the employer was at the time of the injury engaged upon interstate commerce: but the words of the statute are plain and unambiguous, and, if they admit of any construction, it clearly does not admit of the one contended for. On the contrary . . . that language expressly is that every such common carrier shall be liable to any of its employes for all damages which may result from the negligence of any of its employes or by reason of any defect in cars, etc." . . . It "obviously includes all of the employes of every common carrier which is engaged in interstate commerce, whether the employe is so engaged or not. If the common carrier be itself engaged in interstate commerce as part of its business, it is wholly immaterial, under the terms of the act, whether an injured employe was ever so engaged.

"Even if the act regulates commerce in any possible constitutional sense it is too broad and applies not only to interstate commerce, but also to that which is entirely within the states, respectively: and, second, that the provisions of the act in these respects are single and altogether inseparable, the one from the other. Even if some part of the act might be sustained if it stood alone, yet, as all its parts are inseparably connected, all must fall if any should do so." See note 64 Cent. L. J. 56, 63 Cent. L. J. 278, 356. Compare *United States v. Adair*, 152 Fed. 737, on statute June 1, 1898, relating to relations between common carriers and their employes.

In *Howard v. Illinois Cent. R. Co.* [Tenn.] 148 Fed. 997, *McCall, J.*, held on demurrer that the act was unconstitutional. "The commerce mentioned and referred to in the act of June 11, 1906, is the

liability of common carriers, engaged in interstate trade or commerce, to their employees. Congress, by the enactment of this law, assumed that this liability is commerce, or so related to or connected with it as to fall within the power of Congress. . . . I am unable to bring my mind to the conclusion that the liability of a common carrier to its employees for injuries is interstate commerce, or commerce of any character, within the meaning of the commerce clause of the Constitution."

The fact that the Safety Appliance Act may be valid does not imply that this is. "There the carrier is made liable to the employe, not simply because he is injured, but rather because the carrier violates and sets at naught the rules for the government of its business, prescribed by Congress, and because, as a result of such violation, the employe was injured. This liability, in its nature and essence is a penalty. . . . In the act of June 11, 1906, Congress does not undertake to prescribe a rule or regulation for the conduct or government of the business of the common carrier, for the infraction of which a penalty or liability is imposed: but the act only declares that the carrier shall be liable for all damages to its employees, the result of the negligence of its officers, agents, employees, etc."

The act is plain on its face and imposes the same liability on a common carrier whose lines lie wholly within a state if such lines do any interstate business as on a common carrier whose lines handle only interstate business. "The act is single in character, and includes commerce, if it be commerce, wholly within the state, thereby exceeding the authority delegated to Congress by the Constitution of the United States." See post, n. 16.

In *Hall v. Chicago, R. I. & P. Ry. Co.* [Iowa] 149 Fed. 564, the question came up on petition for removal to the Federal court solely upon the ground that the action is one arising under a law of the United States. It was held that the act was not retroactive and that as the cause of action arose in 1905 the petition should be denied. The court said that counsel in argument agreed that Congress was without authority to pass the act, and it was suggested that the effect of the act, if valid, was to abrogate all existing state legislation on the subject: but it was unnecessary to consider these questions.

In *Spain v. St. Louis & S. F. R. Co.* [Ark.] 151 Fed. 522, *Triber, J.*, held the act constitutional: That Congress had power to create and enforce liabilities growing out of the employment of servants by carriers engaged in interstate commerce and that the act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Section 1. That every common carrier engaged in trade or commerce² in the District of Columbia, or in

is separable and does not necessarily regulate intra state commerce. In the case at bar it appeared that the plaintiff was injured on a train engaged in interstate commerce and if the act applied to that the defendant cannot complain that the statute might be invalid in a particular which does not affect him.

In *Snead v. Central of Ga. Ry. Co.* [Ga.] 151 Fed. 608, *Speer, J.*, held the act constitutional: that the persons employed in commerce are instrumentalities of commerce subject to legislative regulation and this power of regulation is unlimited; that the act may have a casual or contingent effect upon intra state commerce does not render it invalid, and this act does not trench upon the rights of the states; it is not a deprivation of due process of law. There was no diverse citizenship in this case and it was heard on demurrer.

The constitutional question was not raised in *Malloy v. Northern Pac. Ry. Co.*, 151 Fed. 1019.

In *Plummer v. Northern Pac. Ry. Co.* [Wash.] 152 Fed. 206, *Hanford, J.*, held that the act was constitutional: it is a regulation of commerce within the power of Congress. The statute creates a new right and a new obligation and section 2 cannot be applied to causes of action arising before the passage of the act although the suit is not begun until after its passage.

In *Kelley v. Great Northern Ry. Co.* [Minn.] 152 Fed. 211, *Morris, J.*, held the act constitutional. Congress having power to regulate commerce may impose upon such commerce regulations which might be considered police regulations. As to a carrier engaged in both interstate and intra state commerce, the act applies, and was intended to apply, where such carrier uses in whole or in part, the same means and agencies in both, and where the employment of the injured employe has some relation to such interstate commerce or to such means and agencies. (The plaintiff here was a track repairer and could recover.) That the interstate carrier may also be engaged in intra state business is incidental and does not defeat the act. *Lancer v. Anchor Line Ltd.* [N. Y.], 155 Fed. 433, *Adams, J.* in admiralty held act constitutional.

² This clause covers all "common carriers engaged in trade or com-

any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employes,³ or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none,⁴

merce" without distinguishing as to the different risks or degrees of danger the several businesses may possess: thus, railroads, street railways, steamship companies (*Lancer v. Anchor Line Ltd.*, 155 Fed. 433), express companies, sleeping car companies, canal companies, and very possibly telegraph companies come within its scope. Statutes modifying or abrogating the fellow-servant rule when applied to railroads have been held valid as being a reasonable classification because of the dangerous character of the business (*supra* § 4), but the only classification attempted in this statute is the fact that the businesses affected are engaged in interstate commerce and not that they are peculiarly dangerous.

The clause seems broad enough to cover injuries received on local branch lines lying wholly within a state if the company in control of them is elsewhere engaged in interstate commerce.

³ Apparently the injured employe need not himself have any duties to perform with reference to interstate commerce or at the time of the injury be brought into contact with other servants or with instrumentalities engaged in interstate commerce. Thus, a machinist in a shop of an intra state line owned by such common carrier, or a freight handler shipping local freight, may come within the statute, though neither has anything to do with interstate business: or a messenger boy of a telegraph company, if such company should be considered within the act, hurt by another messenger while they were delivering local messages, might recover. See *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211, *supra*.

⁴ See *supra*, Chap. II.

This clause names those and only those who are entitled to sue and share in the proceeds under this act, whether the action be brought in the Federal or in any state court. If no persons of the

then for his next of kin dependent upon him,⁵ for all damages which may result from the negligence of any of its officers, agents, or employes,⁶ or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.⁷

description exist, there can be no recovery for the death. It would seem to make no difference what the state laws relating to recovery for death or the proper parties to sue or share may be.

⁵ See "dependency" in Massachusetts Employers' Liability Act, *supra*, § 18, page 115.

⁶ See statutes cited § 73, n. 1, Colorado statute, Appendix, page 679, New York statute, page 393, and Pennsylvania statute, page 395, in this Supplement.

See, also, *Lutz v. Atlantic & P. R. Co.*, 6 N. Mex. 496, where, though the statute specified "any officer, agent, servant or employe," it was held that the fellow-servant defense was not abolished.

The English Employers' Liability Act, and the other statutes modelled on it (except Indiana), contain the phrase "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work," or a substantially similar phrase. See *supra*, § 2, n. 13.

In many railroad statutes (see *supra*, § 73, n. 1) it is provided either that the servant shall be treated as if he were a stranger, or a passenger, or not in the employ of the defendant, or else the statute in terms limits or denies the fellow-servant rule.

It is possible to construe the Federal Act in accordance with the common-law rule of fellow-service, on the ground that the well-established rules of the common law are not to be abrogated by implication merely: but the word "any" in the clause "negligence of any of its officers, etc.," will probably be sufficient to destroy this defense.

⁷ See, also § 73, n. 1, and New York statute at page 393 of Supplement. This clause seems to be declaratory and to impose no new liability. It is to be observed that there is no provision that the negligent employe or the defective cars, etc., must be engaged in interstate commerce.

Section 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.* All questions of negligence and contributory negligence shall be for the jury.*

* The doctrine known as comparative negligence was stated in a few early cases in Oregon, Kansas, and Colorado: it obtains to a limited extent in Tennessee and is found in an Alaska case, *Alaska Treadwell G. M. Co. v. Whelan*, 64 Fed. 462. The earlier cases in Illinois established the rule as a common-law principle, but it has now been discarded there. *City of Lanark v. Dougherty*, 153 Ill. 163; *Cicero & P. St. Ry. Co. v. Meixner*, 160 Ill. 320. It has been expressly denied in England and in most of the states. The rule as developed in Illinois was as follows: If the plaintiff's negligence was not a contributing cause of the accident he might, in Illinois, as well as in every other jurisdiction, recover. If the plaintiff's negligence was the sole cause of the accident or if, though the defendant had been negligent, the plaintiff by the exercise of ordinary care could have avoided the accident, he could not recover in Illinois or in any other jurisdiction. Neither of these examples involved the rule of comparative negligence. But where the negligence of both plaintiff and defendant contributed to the injury, the plaintiff might in Illinois recover where his negligence was "slight" and the defendant's negligence was "gross." Negligence was considered as having three degrees, "slight," which could not be said to be a lack of ordinary care, "ordinary," which was a lack of ordinary care, and "gross," which almost approached recklessness or willfulness. The plaintiff could recover only where his negligence was "slight" and the defendant's "gross." If the plaintiff's negligence was equal to or greater than the defendant's, he could not recover, or, if his negligence was "ordinary" while the defendant's

was "gross," he could not recover. The Federal statute seems not to establish degrees of negligence as such, but merely to contrast the negligence of the parties, and if the plaintiff is guilty of the lesser negligence to permit a recovery, leaving the jury to adjust the matter in its award of damages. This is not comparative negligence as developed in Illinois but seems rather to approach the rule enacted in the statutes below quoted.

Georgia has the following statutes:

Civil Code 1895, § 2322 (3034). *Consent or Negligence.* No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.

§ 2323 (3036). *Injury by coemployee.* If the person injured is himself an employe of the company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery.

§ 3830 (2972). *Diligence of Plaintiff.* If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

Florida has copied § 2322 of the Georgia Code above quoted but inserts the words "or increased" after the word "diminished." Florida Laws 1891, c. 4071, repealing Florida Laws 1887, c. 3744. Compare Mass. Acts 1906, c. 463, Pt. II, § 245. As to the rule in admiralty see supra, § 84, n. 43. See *Morisette v. Canadian P. R. Co.* [Vt.] 56 A. 1102 (Canadian statute).

The word "gross" in the Federal Act is used in the meaning of degree of negligence as compared with the plaintiff's negligence and not in the sense of a willful or wanton act, to which contributory negligence is not a defense. Supra, § 127.

Neither is it to be construed with reference to the applicability of the defense of contributory negligence as if it were used in a penal statute, as is the case in the Massachusetts statutes permitting recovery for death due to the "gross negligence" of a railroad company's servants. Supra, § 18, § 73, n. 1.

Do the words "negligence of the employer was gross" refer to

the employer's own negligence simply or also to the degree of negligence of his servants? The employer, although a corporation, may be slightly or grossly negligent with reference to those duties which are regarded as personal to the master and for which he would have been liable even at common law. When however by virtue of section 1 of this statute the master is held answerable for all negligence of his servants whether it occur in the performance of duties personal to the master or not it would seem to be stretching the words of the statute rather far to hold that he may be guilty of slight or gross negligence in such a case. For example one sectionman may run a hand car against another, and whether this is done by slight or great carelessness the master under section one (if the fellow-servant rule is abrogated) is liable, but no personal duty of the master is involved and he is liable only because the fellow-servant defense is taken away and not because he or any one delegated with the performance of his duties was actually careless. It would seem that section 2 only applied when it can be said that the employer himself was careless with reference to his personal duties, and that when the injury occurs only through a fellow-servant's negligence the section does not apply, however careless the servant may have been. If Congress intended otherwise it would seem that the words should have been "negligence of the employer or of any of its officers, agents or employees was gross." This section applies only to causes of action arising after the passage of the statute. *Plummer v. Northern Pac. Ry. Co.*, 152 Fed. 206, *supra*.

* It does not seem probable that this clause will be construed to change or affect the fundamental principles of trial by jury. It provides that "all questions of negligence . . . shall be for the jury" just as they always have been: if the evidence offered does not in point of law support the allegations necessary to be made by the plaintiff, or if the evidence taken in the light most favorable for the plaintiff presents no conflicting facts or inferences of fact tending to show negligence then there is no "question" for the jury to decide. *Supra*, §§ 54, 131.

The functions of court and of jury have several times been stated by the United States Supreme Court: "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact,

of which there is no evidence from which it may be legally inferred. Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many states superseded the ancient practice of a demurrer to the evidence." *Parks v. Ross*, 11 How [U. S.] 362, 373.

"There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. . . . The instruction given overlooked the line which separates two separate spheres of duty. Though correlative they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. . . . These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system." *Hickman v. Jones*, 9 Wall. 197; *Richardson v. City of Boston*, 19 How. 263; *Merchants' Nat. Bk. v. State Nat. Bk.*, 10 Wall. 604.

"'Trial by jury' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them in the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." *Capital Traction Co. v. Hof*, 174 U. S. 1.

For history of trial by jury, see 2 Pollock & Maitland *Hist. of Eng. Law*. pp. 619-629; J. B. Thayer, *Preliminary Treatise on Evidence*, Chaps. II-V.

If this clause were to be so construed as to alter the respective

functions of judge and jury it would seem to violate the Seventh Amendment of the Federal Constitution. "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The judge may direct a verdict for the defendant when there is no evidence tending to show negligence, or in most jurisdictions where there is merely a scintilla of evidence, or he may set aside a verdict rendered contrary to the weight of the evidence (*supra*, §§ 54, 131). The only scope that it would seem possible to give this clause, within constitutional limits, would be with reference to directing a verdict when there is merely a scintilla of evidence.

The New York Act provides in section 3 (see Appendix) "The question whether the employe understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance at work . . . shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence." Although this statute preserves the powers of the court with reference to setting aside verdicts, it has been held that it does not take away the power of the court in a proper case to direct a verdict. *Wilson v. New York Mills*, 107 App. Div. 49, 94 N. Y. S. 1090. See § 117.

The clause in question if construed to be anything more than declaratory of the common law would seem not to be binding on cases brought under the statute in state courts.

"Whether a defendant in an action at law may present in one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of 'practice, pleadings and forms and modes of procedure,' as to which the courts of the United States are now required by the Act of Congress of June 1, 1872, Chap. 255, Sec. 5 (17 Stat. 197), reenacted in Sec. 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had." *Central Transportation Co. v. Pullman Palace C. Co.*, 139 U. S. 24. Compare *Morisette v. Canadian P. R. Co.* [Vt.] 56 A. 1102, on Canadian statute providing that assumed risk and contributory negligence shall go only in reduction of damages.

"Contributory negligence" in this clause should not be construed to cover the issues of assumption of risk or *Volenti non fit injuria*, *supra*, § 86. But see *Schlemmer v. Buffalo R. & P. R. Co.*, 27 Sup. Ct. 407, 205 U. S. 1, criticised in 64 Cent. L. J. 345.

Section 3. That no contract of employment,¹⁰ insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe.¹¹ Provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.¹²

Section 4. That no action shall be maintained un-

¹⁰ In *Malloy v. Northern Pac. Ry. Co.*, 151 Fed. 1019, the complaint charged negligence on the part of the defendant, a common carrier engaged in interstate commerce, in operating an unguarded saw in its car shops whereby plaintiff was injured. The answer set up that the danger was obvious and assumed by plaintiff by his acceptance of the employment: to which there was a demurrer. Held demurrer sustained. "The intent and object of Congress in the enactment of this statute is plain, viz., it is to make the liability of common carriers engaged in interstate commerce for injuries to their employes in consequence of negligence, or insufficiency or defects of the physical property used in the carrying business or pertaining thereto, more nearly absolute, and to deprive such employers of the benefit of defenses which were, previous to the enactment of the statute, legal. . . . An express contract between the plaintiff and the defendant exempting the latter from liability for damages in case of an injury caused by the operation of a saw in its car shop, negligently permitted to be unnecessarily dangerous by reason of being unboxed, would not constitute a bar to a recovery of damages in this case, because the statute so declares, and if an express contract would be unavailing, this special defense, predicated upon an implied contract, must also fail." See *supra*, §§ 25, 82, 116, 117. It is unlikely that the defence of assumption of risk will be considered abrogated by this statute.

¹¹ See *supra*, § 25.

¹² See *supra*, § 26.

der this act, unless commenced within one year from the time the cause of action accrued.¹³

Section 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employes under the safety appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.¹⁴

Approved June 11, 1906, c. 3073, 34, Stat. 232.¹⁵

Act held unconstitutional.¹⁶

¹³ See *supra*, §§ 34, 36.

Such a limitation is a part of the right and not of the remedy, and an action cannot be had under this statute after the year, even if the statutes of limitation of the forum would permit it.

Also since by this enactment, the Federal government has regulated negligence cases between common carriers engaged in interstate commerce and their employes, such regulation is exclusive and state laws upon the subject matter are abrogated. It can hardly be that state laws are suspended for a year only after an accident and then spring into temporary vitality because a plaintiff has not availed himself of this statute within the time.

The year, in case of death, would seem to run from the date of the occurrence of the accident, and not from the date of death. The statute seems to give but one cause of action, in which the fact of death may be an element of damages: it is a survival statute rather than one giving a cause of action for death itself. *Supra*, Chap. II.

The recovery for the death is not a new cause of action, and a settlement made with an injured employe will bind the beneficiaries in case of his death. *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, citing cases.

¹⁴ The Safety Appliance Act, providing for the equipment of locomotives and cars with certain appliances and affixing a penalty for violation of it provides in section 8 as follows:

"That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment

of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge." See *supra*, § 116. *Schlemmer v. Buffalo R. & P. R. Co.*, 27 Sup. Ct. 407, 205 U. S. 1.

¹⁵ If this statute shall be held valid, or, if in any way restricted in scope, then in so far as it shall be held valid, "it is the supreme law of the land of general application, and as such is binding upon all courts—state and federal" (*Brooks v. Southern Pac. Co.*, *supra*, n. 1). See, also, *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96; *Chesapeake & O. R. Co. v. American Exchange Bk.*, 92 Va. 495.

A state court can not regard it or rights acquired under it as if the statute had been passed by a sister state; the fact that it is a Federal statute enacted in the exercise of an exclusive power granted to the Federal government makes it the law of each state and of the country itself. While it does not pretend to and can not regulate state procedure nevertheless whatever pertains to the right of action and to the remedy, except matters of procedure, must be controlling on the states.

The measure and rules of damages in personal injury cases as declared in the several states are not affected save in so far as the phrase "for all damages which may result from the negligence" may be construed to forbid punitive damages.

As this is a negligence statute, if it should be sustained it would seem that so much of Section 2 as relates to comparative negligence would thereby become binding on state courts. It might well be that were this a state statute another state would, in determining rights acquired under it, hold that its own rules of contributory negligence should be applied rather than the statutory rule, but such a holding would hardly seem possible where, being a Federal statute, it is the law of the land.

In regard to the last clause of this section relating to questions for the jury, it would seem that this, if it be given effect at all, could only regulate the procedure in the Federal courts, and would not be held binding on state courts. The conduct of the trial of the issue, the tribunal to decide it and the manner of decision are purely matters of procedure or remedy and do not pertain to any right or cause of action created by the statute.

The reasoning that applies to comparative negligence in Section 2 would seem to hold in relation to Section 4 and the Safety Appliance Act § 8 referred to in Section 5.

Assumption of Risk.

The act is silent upon the question of assumption of risk, for this issue is not the same as "contributory negligence" referred to in Section 2 (*supra*, § 86).

The defense is affected only by the apparent abrogation of the fellow-servant rule in Section 1 and by § 8 of the Safety Appliance Act.

Since the passage of this statute the servant still assumes the necessary or incidental risks of the business to the same extent that he did before its enactment (*supra*, §§ 90, 91).

He still assumes the risks arising from the manner in which the business is conducted or from the condition of the premises which were known or obvious to him upon his entrance into the employment (*supra*, §§ 92-99). The last clause of Section 1 does not remove this defense since it says "by reason of any defect or insufficiency due to its negligence" and there is no negligence, because there is no duty, in regard to known or obvious dangers when the employment is accepted (*supra*, §§ 82, 83, 88).

Except as qualified or limited by § 8 of the Safety Appliance Act, the servant still assumes the risk of dangers arising after his entrance into the employment due to the master's negligence and obvious, or known and appreciated, by the servant and assented to by him. Whether this rule be placed upon the maxim *Volenti non fit injuria* or on an implied contract, if the evidence sustains the issues of knowledge, appreciation and assent the plaintiff cannot recover (*supra*, §§ 82, 102, 114). Here again the last clause of Section 1, above referred to, seems not to affect the defense, for in the first place it is declaratory of the common law and secondly it is a principle of general law that the servant may not recover for a breach of duty on the master's part to which he has assented or the consequences of which he has waived, and the defense would not be taken away by implication but only by distinct enactment.

Section 8 of the Safety Appliance Act provides that continuance in the employment after the servant has knowledge of the violation of the provisions of the Act shall not mean that he assumes the risk. But assent to the violation or the risk might doubtless be proved in other ways than by the mere continuance at work and if so the risk may still be assumed. Continuance at work is but evidence of assent which the English courts, differing from the greater number of state courts, have never considered conclusive. There would still seem to be room in spite of this statute for the application of the maxim *Volenti non fit injuria* (*supra*, § 114 *et seq.*).

Since, with the exceptions above noted, the statute does not affect the doctrine of assumption of risk in its several aspects, and as this is a matter of general law each state, in an action brought under this statute in a state court, would apply its own rules on that subject.

¹⁶On January 6, 1908, the United States Supreme Court handed down decisions in the cases of *Howard v. Illinois Cent. R. Co.* and *Brooks v. Southern Pac. Co.*, *supra*, affirming judgments of the courts below on the ground that the statute regulated interstate and intrastate commerce; that intrastate commerce was not subject to the regulation of Congress; and that the provisions relating thereto in the statute could not be separated from the other portions of the act. The opinion on this point was by a majority of the court.

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